U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)

DATE: August 10, 2000

CASE NO.: 2000-STA-28

IN THE MATTER OF:

NANCY YOUNG

Complainant

v.

SCHLUMBERGER OIL FIELD SERVICES [1]

Respondent

APPEARANCES:

Nancy Young, Pro Se

On Behalf of Complainant

TONYA WEBBER, ESQ.
MELISSA RICARD, ESQ.

On Behalf of Respondent

BEFORE: LEE J. ROMERO, JR.
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises under the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 31105 (herein the STAA or Act), and the regulations promulgated thereunder at 29 C.F.R. Part 1978. The STAA prohibits covered employers from discharging or otherwise discriminating against employees who have engaged in certain

[1] The name of Respondent appears as amended at the hearing.

protected activities with regard to their terms and conditions of employment.

On or about October 5, 1999, Complainant filed a complaint against Respondent with the Occupational Safety and Health Administration (OSHA), U. S. Department of Labor (DOL) complaining of various alleged unsafe acts under the STAA, including her July 6, 1999 termination. (ALJX-1). An investigation was conducted by OSHA and on January 21, 2000, the Regional Administrator for OSHA issued the Secretary of Labor's Findings concluding that Complainant's complaint lacked merit. (ALJX-2). On January 26, 2000, Complainant filed an "objection" to the Secretary's findings and requested a formal hearing. (ALJX-3).

This matter was referred to the Office of Administrative Law Judges for a formal hearing. Pursuant thereto, a Notice of Hearing and Pre-Hearing Order issued scheduling a hearing in Corpus Christi, Texas on May 2, 2000. (ALJX-4). On April 4, 2000, in compliance with the Pre-Hearing Order, Complainant filed a formal complaint alleging the nature of each and every violation claimed as well as the relief sought in this proceeding. (ALJX-5). On April 21, 2000, Respondent duly filed its Answer to the Complaint. (ALJX-6). The parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. [2]

On June 6, 2000, the transcript of record and exhibits were received by the undersigned. A preliminary review of the exhibits revealed three categories of exhibits requiring clarification. On June 13, 2000, an order issued to the parties seeking clarification of (1) exhibits which were received into the record at the hearing but not physically present in the record, (2)exhibits which were present in the record but never received as an exhibit and (3) two exhibits which were not formally ruled upon at the hearing. Based upon the submission of the parties, Complainant's Exhibit XC-6-zyzzzl was noted as an existing exhibit but identified as Bates No. 382 and XC-6-zyzzzkl is hereby received in the record without objection. Complainant's Exhibits XC-17 (1-15, 1-16, 1-17 and 1-17a) have been formally presented and added to the record. The rejected exhibits, XC-24-17 and XC-24-18, have been received from Complainant and added to the rejected exhibits. The following exhibits, which were present in the record exhibits but never received, have been formally removed from the exhibits of record based upon the agreement of the parties: XC-6-T, XC-6-zyzzzm, XC-8-

---

[2] References to the record are as follows: Transcript: Tr.___; Complainant's Exhibits: CX:___; Respondent's Exhibits: RX-___; and Administrative Law Judge Exhibits: ALJX-___.

9, XC-12-1 and XC-4-1-27. Without objection, the following exhibits are hereby received into the record: XC-8-6-1 and XC-1(e).

Complainant and Respondent filed post-hearing briefs by the due date of July 3, 2000. Based upon the evidence introduced and having considered the arguments and positions presented, I make the following Findings of Fact, Conclusions of Law and Recommended Order.

I. ISSUES[3]

A. Whether Complainant engaged in activities protected under the STAA.

B. Whether Respondent discriminated against Complainant in retaliation for her alleged protected activities.

II. CONTENTIONS OF THE PARTIES

Complainant's formal complaint alleges a myriad of activities and "inadequate and unsafe" conditions about which she claims to have complained. She contends that she was discriminatorily terminated by Respondent because she filed a complaint, began a proceeding, testified in a proceeding or will testify in a proceeding related to a violation of the commercial motor vehicle safety regulations. She avers that her discharge was related to her refusal to drive an unsafe commercial motor vehicle because she was not properly licensed about which she had a reasonable apprehension that she or someone else would have been seriously injured or impaired had she operated the unsafe vehicle. She further contends that she complained that Respondent's electronic on-board computer system and logging procedures were not in compliance with DOT regulations and refused to falsify electronic logs to match DOT paper logs or visa versa which was illegal and not in compliance with DOT rules and regulations.

Respondent, on the other hand, argues that Complainant did not engage in any protected activity and failed to establish that any logs were falsified or that she was forced to edit logs or required

---

[3] At the conclusion of Complainant's case, Respondent moved for a "directed verdict" or summary judgment on the basis of a lack of credible evidence of any protected activity. The motion was denied because an arguable **prima facie** case had been presented sufficient for Respondent to go forward with its case. In view of my findings and conclusion, Respondent's motion is now moot.

or instructed to drive a commercial motor vehicle that was unsafe or without a proper license. Respondent further contends that there is no causal connection between Complainant's separation from employment and her alleged protected activities. Respondent asserts it had a legitimate business reason for separating Complainant from employment which she failed to rebut as pretext and that Complainant would have been separated regardless of her alleged protected activity.

III. SUMMARY OF THE EVIDENCE

Complainant Nancy Young

Complainant has an associate degree in electronics and occupational safety and health technology. She was referred to Respondent by Del Mar College where she worked as a computer technician/student assistant. (Tr. 660-661). Complainant began employment with Respondent on April 27, 1998 as a systems administrator in the Alice, Texas district. Her job duties consisted of taking care of the software for the new electronic on-board Rockwell system. On July 1, 1998, her job duties were supplemented to include training drivers on the log-in procedures of the Rockwell system and supervising the installation of hardware. (Tr. 604-606). She testified that training drivers required her to drive commercial motor vehicles (CMV). She was instructed to drive CMVs by Lance Marklinger, the facility manager at the Alice district. Id. Complainant obtained a driver's permit in June 1998 which required that she drive with a licensed driver. (Tr. 607).

In August or September 1998, she began reporting to Jay Kleinheinze, the new acting facility manager. (Tr. 608). Mr. Kleinheinze changed her duties to include supervising the installation of Rockwell units, test-driving DOT CMVs and training DOT drivers on the system. (Tr. 609).

Complainant testified that, from her date of hire through September 1998, she complained to Mr. Marklinger that the keypads for the Rockwell system were improperly mounted on the floorboard or not mounted at all creating an unsafe condition in that the keypads on the floorboard were a visual distraction or if unmounted could hit the driver in the head. (Tr. 610-611, 613-614). Corrections to the conditions were initiated when Mr. Kleinheinze assumed the district, but not in all areas since Victoria, Texas and Mission, Texas had the same problems. (Tr. 611). She stated that in June 1999, Victoria, Texas still had units mounted on the floorboard, behind the seat or not mounted at all. (Tr. 612).

She also complained about improper wiring of the electrical circuits which caused system units to catch fire.[4] She voiced her complaints at a meeting held on July 20, 1998 in Corpus Christi, Texas, where Neil Campbell, Alan Melton and Guy Lombardo were present. (Tr. 614, 617). She complained that electrical shorts were causing cellular phones and vehicle batteries to die out and addressed the issue of the keypad mountings and wire harnesses. (Tr. 618-620). Mr. Melton, Rockwell project coordinator, responded that there was no way any of her complaints could be happening. Mr. Lombardo informed her that she was only at the meeting to provide an update on installations. (Tr. 621-622). According to Complainant, no one indicated that the problems would be investigated and corrected, nor did anyone request that she document such conditions in RIRs or e-mails. (Tr. 623). She thereafter wrote RIRs about the conditions and submitted the forms to Bill Greer, QSHE coordinator for the Alice district. (Tr. 624). She never received any feedback from the RIRs and no corrections to the conditions were performed except through her personal efforts. (Tr. 625, 793).

Complainant testified that she first encountered an inoperable speedometer in June 1998 after returning from basic driving school in Kellyville, Oklahoma. She did not drive any vehicles with inoperable speedometers because she was not properly and completely licensed. She claims that Lance Marklinger and Jay Kleinheinze demanded that she drive a vehicle even though she was unlicensed. (Tr. 626-627). She was not told that she would be terminated if she did not drive a vehicle. (Tr. 628). She refused to drive on both occasions because she was not properly licensed. (Tr. 629). No action was taken against her by management because of her refusal. Id.

In September or October 1998, she complained to Jay Kleinheinze about improper wiring causing electrical short-circuits related to vehicles with dead batteries. (Tr. 629-630). Although she prepared a RIR, no feedback or action was taken to correct the condition. (Tr. 630-631). She claimed that of the 150 vehicles in the Alice district, 40 units did not have operable speedometers and were used on the road, which was the subject of yet another RIR. (Tr. 632). She stated that she did not drive the units but noticed the speedometers were not working because no speed was recorded on

---

[4] Complainant testified that every time she encountered improper (uninsulated) wiring, she would take photos of the incident and provided the photos with a Risk Identification Report (RIR). This activity evidenced her troubleshooting and discovery of unsafe conditions of vehicles. (Tr. 779, 783-793; XC-20, 1-7 of 8 pages).

the electronic logs from the on-board computer system. (Tr. 633-634, 636). She also noticed four inoperable speedometers of eight units in Mission, Texas. (Tr. 636-637). Again, she wrote a RIR and gave it to Emilio Rinche, the "systems administrator." (Tr. 638). In Victoria, Texas, she noted ten or eleven inoperable speedometers and on-board computers of the 15-20 vehicles. She prepared a RIR and presented it to Ronnie Walling, the location manager. Id. She testified that some, but not all, speedometers were later corrected. (Tr. 639).

In December 1998, Complainant complained about the editing of electronic and paper logs at a meeting in Iowa where Mr. Melton informed her that he did not want to hear about it. (Tr. 640-642). She stated that the "falsification" of a log is not an unsafe condition. (Tr. 643). Editing of a log simultaneously with the return from an assignment appears to be acceptable to Complainant, but not if the editing occurred three or four days later. (Tr. 645). She wrote RIRs on the alleged falsification of the electronic logs, including five "sand chiefs" drivers who she claimed were over-logging with 18-20 hours of driving time per day. (Tr. 646-647). She testified that QSHE Roger Theis instructed her in November 1998 to select two drivers to test the Rockwell system and start editing electronic logs versus paper logs. (Tr. 650). She only edited logs from November 1998 to January 1999 when her job duties changed. (Tr. 651).

On January 24, 1999, Roger Theis informed her that she would start training system administrators, reviewing software and editing, and overseeing installation and repairs of on-board computers. Id.

Complainant acknowledged that she had no direct knowledge of drivers being told they would be terminated if they did not drive vehicles with inoperable speedometers. (Tr. 649). Drivers reported inoperable speedometers and she prepared RIRs about such conditions for local managers. (Tr. 650).

Complainant testified that she also prepared RIRs on other matters considered unsafe such as emergency exits, fire protection and hearing protection. (Tr. 662). She complained about "management factors" which she explained to be a lack of new employee training as an oversight by management and an inadequate safety environment. (Tr. 664). She also complained that Respondent made "improper assignment of responsibilities," which she explained as if she was not to edit logs, she should never have been assigned to edit logs. (Tr. 665). She complained that Respondent had "unsuitable equipment," such as the computer system and wiring harness and "insufficient funding" to carry out the

travel to troubleshoot the system. (Tr. 667). She also noted that there existed an "ignorance of the hazards of materials or processes, situational factors and environmental factors," such as transporting unlabeled drums. (Tr. 667-668). All of the foregoing complaints were internally made to unspecified individuals.

Complainant testified that on April 27, 1999, she was authorized by Dave Church, "area upper management that oversaw South Texas," to shut down any unit in his area that did not have a working monitor or for any unsafe condition or she "was going to lose [her] job." (Tr. 809-810). No written authority was ever issued to Complainant by Mr. Church. (Tr. 811). She stated that Andrew Gould also directed that "no unit will be driven unsafe." Id. Mr. Fulin issued an e-mail to Mr. Church that any vehicle without a working driving monitor was to be put out of service immediately. (Tr. 813; XC-6-ZyzzzS2, Bates No. 391). She stated that on May 3, 1999, Mr. Fulin took away her authority to deadline vehicles, but she was to continue to "red tag" the vehicles which were not in compliance and inform the location managers. (Tr. 815; XC-6-Zyzzl, Bates No. 354). Following the e-mail, on May 3, 1999, Mr. Fulin informed her that she would not lose her job. (Tr. 817).

Complainant testified that on June 21, 1999, Mr. Lombardo told her to edit logs to match, electronic logs to the paper logs, "no matter what; you will falsify these logs; you will do what I say." (Tr. 653). No one else was present during the discussion. Complainant was aware that Mr. Lombardo was coming to Corpus Christi to gather information to present at a driver monitor meeting. The transition from manual to on-board computer system was still ongoing at this time and paper and electronic logs were still being used since the district had not gone "live" with the Rockwell system. (Tr. 653-654). Complainant testified that when she showed the logs to Mr. Lombardo he became furious and demanded "you will do it my way." She responded "no, I've already been to DOT, and I will go to DOT/OSHA." Complainant claims Mr. Lombardo also told her that she will drive a commercial motor vehicle without a working speedometer. (Tr. 671).

Complainant testified that in May or June 1999 she contacted Linda Clark at Human Resources because she wanted out of her position and sought a job as an electronic technician or computer technician, but was informed that Respondent was not transferring or hiring because of a "freeze." (Tr. 672). After Complainant's conversation with Ms. Clark, she forwarded a letter dated June 26, 1999 stating a fear that Mr. Lombardo was trying to terminate her position as an area systems administrator because she reported log editing and unsafe conditions. She commented that she feared discharge for "whistleblowing" and because Mr. Lombardo did not

like her because she was a woman. She further noted that she would inform Mr. Lombardo at a June 28, 1999 meeting about all of the issues raised and that she was going to DOT/OSHA to report unsafe acts. (XC-35-1 and 35-1a).

Complainant's reference to "DOT" was actually the Texas Department of Public Safety where she and driver trainer Ralph Bocanegra visited in May 1999 to gather information and clarify issues about editing, entering data and cargo checks not being recorded on the logs.[5] (Tr. 655-656). No complaint was filed with the Texas Department of Public Safety. (Tr. 657). Complainant acknowledged that she did not file any complaints relating to a violation of commercial motor vehicle safety regulations before her termination in July 1999. (Tr. 658). She stated she was attempting to initiate the instant proceeding by reporting unsafe conditions and illegal electronic logs to the Department of Public Safety. She claimed Mr. Fulin had knowledge of her visit since she reported her visits and complaints to him. (Tr. 659). She acknowledged that the department could not do anything until she filed a complaint. Id. She did not file a written complaint nor did she testify in any proceeding before her termination. (Tr. 660).

On July 6, 1999, Complainant was informed by Mr. Fulin that there was no Alice position available and she was terminated. No explanation was given by Mr. Fulin for the termination according to Complainant. She was provided a letter dated July 6, 1999, which explained her termination as related to the reduction in force. (RX-37). Complainant testified that she told Mr. Fulin that Respondent was not downsizing at the Alice district and she was being terminated because she refused to drive a vehicle without a proper license and without an operable speedometer. She informed Mr. Fulin that she had gone to DOT and Mr. Lombardo knew she was going to DOT and OSHA after the June 21, meeting. (Tr. 670).

On July 9, 1999, Complainant wrote to Mr. Euan Baird, Chairman, President and CEO of Respondent, seeking his assistance in reinstating her to employment. She asserted her discharge was for discriminatory reasons: whistleblowing, complaining about health and safety violations, gender, minority and age

---

[5] Complainant later testified that they visited the Texas Department of Public Safety on March 5, 1999. (Tr. 766). She claimed that SGT Salinas was shown an electronic log which had been "falsified" because the location sites were not shown and the driver had "over-logged." These allegations could not be correlated to the paper log which verified the accuracy of the claim. (Tr. 774).

discrimination. (XC-33-1, 33-1a and 33-1b).

On August 17, 1999, Complainant met with Liese Borden of Human Resources and Neil Campbell in an effort to achieve reinstatement to her job. (Tr. 674). The safety issues, refusal to drive a commercial motor vehicle and unsafe conditions were discussed according to Complainant based on a list of issues presented to Mr. Campbell as well as issues raised in her letter to Mr. Baird. (Tr. 695, 696-697; XC-31-1). She testified that Mr. Campbell informed her that there were two reasons why Paul Rose was retained to replace her: (1) because he had a higher skill ranking and (2) he "did not go to the DOT like you did." (Tr. 832-833).

On October 13, 1999, Respondent informed Complainant that, after looking into the issues raised by her on August 17, 1999, it was concluded her termination was based on a reduction in force due to the economic downturn in the business. (XC-26-1). After an upturn in business, Complainant submitted her resume to Human Resources for placement consideration in March 2000. (Tr. 748; XC-1(e)). She testified that employment opportunities were pursued after her termination but without success. (Tr. 829-830).

On cross-examination, Complainant testified that RX-36, an undated "diary," was prepared for EEOC and OSHA and presented to Mr. Campbell on August 17, 1999. The top portion relating to remedy was not prepared until October 1999, after receipt of the Respondent's letter denying reinstatement. (Tr. 835-836). She claims her interest in DOT rules and regulations began while employed for three months with a trucking company in 1984. (Tr. 845). She continued with her interest while performing other non-related jobs as an electronic technician, a design layout and reporter for a local newspaper and a co-owner of a western hat store. (Tr. 845-846). She never had another job involving DOT regulations until she became employed with Respondent in 1998. (Tr. 847). She stated she was discriminated against on the basis of her sex, age and whistleblowing. (Tr. 847). She further stated that the "diary" was prepared after her termination on July 6, 1999, but before her letter to Mr. Baird, because she thought of sending it to him on July 9, 1999. (Tr. 848-849).

She acknowledged that reductions in force because of a business downturn occurred in September 1998 and continued into 1999 in Alice, Mission and Victoria, Texas. (Tr. 853-854). She was aware of the reorganization of the Corpus Christi, Texas office from a regional to a sales office during the reduction in force. (Tr. 856). She further acknowledged that she was told she was laid off because of the reduction in force. (Tr. 857-858; RX-37). Upon being informed of her reduction in force, she told Mr. Fulin that

she was not being terminated for downsizing but because she refused to drive a vehicle and because of her reports of unsafe conditions. (Tr. 859). She estimated that she wrote 30 to 40 RIRs per month about unsafe conditions which were also made the subject of e-mails. (Tr. 870). However, none of her RIRs and e-mails relating to unsafe conditions were offered into evidence in this case. (Tr. 865, 871). Her numerous e-mails cover the time period from July 1998 through July 1999 as reflected on her exhibit list, pages 2-9. (Tr. 873-874; RX-43).

She testified that in March 1999, she spoke with Mr. Campbell and Mr. Lombardo about the speed recorded on vehicles, logging and improper wiring, all of which were part of her job as an employee of Respondent. (Tr. 879). She was a member of the loss prevention team from December 1998 until July 1999 which is an investigative team that looks into accidents and reviews RIRs for corrective plans. (Tr. 880-881).

She acknowledged that the report requested by Mr. Lombardo on May 24, 1999, regarding the state of Rockwell implementation had still not been provided in the format requested by June 21, 1999 because her lap top computer was not working properly. (Tr. 883-885). She recanted her testimony subsequently, stating that the report information had been provided at her meeting with Mr. Lombardo on June 21, 1999. (Tr. 886). Moreover, she stated that she had provided a timely report on May 26, 1999, by e-mail with an attachment containing the information requested. (Tr. 887-890). However, the attachment was not offered into evidence in this proceeding. (Tr. 890-891). She further acknowledged that the e-mail did not contain up-to-date information and does not reflect that an attachment was part of the communication to Mr. Lombardo. (Tr. 892, 894-895; RX-13).

Complainant claims that she refused to drive a CMV as demanded by Mr. Lombardo on June 21, 1999, and told him she would “go to DOT.” She informed Mr. Lombardo that if conditions were not corrected, she was going to go to DOT/OSHA, but stated that Mr. Lombardo spent the whole day working with her in a June 23, 1999 meeting. (Tr. 896, 932, 936-938, 962).

Contrary to her pre-hearing deposition where she identified only Mr. Lombardo and Ronnie Walling as having told her to drive vehicles, she testified at the hearing that her first two facility managers, Lance Marklinger and Jay Kleinheinze, also told her to drive vehicles, all of which she refused to do. (Tr. 959-961).

On June 26, 1999, she claims to have prepared a letter to Ms. Linda Clark of Human Resources because she feared the loss of her

job after Mr. Lombardo told her she would do things his way. (Tr. 938). However, she did not mention Mr. Lombardo's demand that she drive a vehicle without a CDL or with a non-working speedometer, or that she would go to DOT, or that he expressed hostility to her at the June 21, 1999, meeting even though Ms. Clark requested she put her concerns in writing. Nor did she mention Mr. Lombardo's hostility in the July 9, 1999, letter to Mr. Baird or the "dairy" prepared for OSHA and presented to Mr. Campbell on August 17, 1999. (Tr. 938-939, 963, 966). Although the June 26, 1999 letter was considered an important piece of evidence in her case, she failed to mention it in her "diary" to OSHA. (Tr. 941-942). Incongruently, Complainant mentioned in the June 26, 1999, letter that she had a meeting scheduled on June 28, 1999 with Mr. Lombardo and "**will** inform him on all the issues that have been going on" and "am also **going to tell him** that I will be going to DOT/OSHA, because I have a job to do and it is my responsibility to report unsafe acts and when we are not in compliance with DOT/OSHA." (Tr. 948-949; XC-35-1 and 1a).

Complainant testified that she obtained a 90 day CDL permit and attended basic driving school in June 1998, but did not complete the driving portion of the CDL testing within the 90 days required period. The permit ran out in September 1998 and she never renewed the permit. (Tr. 899-902). Although she claims Respondent sabotaged her lap top on the day of her termination, she also testified that the lap top was at the IBM repair center on her date of termination. (Tr. 905).

She further reiterated that prior to her termination, she had not filed any written or verbal complaints with OSHA. She had never filed a written complaint with DOT before her termination, but claimed to have filed a verbal "complaint" with the Texas Department of Public Safety on March 5, 1999, about electronic logs. (Tr. 911). However, she and Mr. Bocanegra visited the Department seeking information about electronic logs and when asked if she wished to file a complaint, declined to do so. (Tr. 912).

The May 19, 1999 report to Mr. Fulin was prepared as a follow-up to Complainant's meeting with him on April 30, 1999 and sets forth her main concerns with a corrective action plan. (Tr. 915-916; XC-36-1 and 36-1a, Bates Nos. 972-973). She claimed it was not prepared because of fear that she may lose her job, but to confirm that she still had a job. (Tr. 917). However, she was concerned for her job because Mr. Lombardo yelled at her and attacked her verbally, which were not mentioned as concerns in her report. (Tr. 921).

Complainant confirmed that her July 9, 1999 letter to Mr. Baird acknowledged she was told her job was eliminated because of downsizing. The letter was devoid of any mention of conversations with Mr. Lombard about refusing to drive unsafe CMVs or because she did not have a CDL or permit or threatening to go to DOT/OSHA. (Tr. 968; RX-30). She further confirmed that her agenda of issues used in her meeting with Ms. Borden on August 17, 1999, did not list Mr. Lombardo's hostility to her or his demand that she drive an unsafe CMV. (Tr. 969-971). Regarding her "diary" of events presented at the August 17, 1999 meeting, she did not list the May 19, 1999 report to Mr. Fulin, her visit to the Texas Department of Public Safety with Mr. Bocanegra on March 5, 1999 or May 3, 1999, or the June 26, 1999 letter to Ms. Clark. (Tr. 972-973). Lastly, after the meeting, in preparation for the OSHA investigation, Complainant added a synopsis of the August 17, 1999 meeting to the "diary" which reflects that Mr. Lombardo picked Paul Rose over Complainant because he was more comfortable with him and does not mention Mr. Campbell's alleged statement that Paul Rose was retained rather than Complainant because he did not go to DOT as she did. (Tr. 974-975).

In her initial complaint filed with OSHA, Complainant acknowledged that she did not allege anything from the June 21 and 23, 1999 meetings with Mr. Lombardo, the meeting with the Texas Department of Public Safety or being forced to drive an unsafe CMV or driving without a CDL or permit. (Tr. 978; ALJX-1). The complaint allegations related only to falsification of logs. (Tr. 980). Nor did she allege any of the foregoing in her complaint filed with the Texas Department of Public Safety on October 8, 1999, other than the falsification of logs. (Tr. 981-982; RX-31).

Complainant's transcription of conversations taped with the OSHA investigator do not mention any complaints about being forced to drive an unsafe vehicle or driving without a CDL or permit, nor do the Secretary's Findings reflect any mention of such allegations. (Tr. 985-986; RX-25; ALJX-2). She admitted that she received no reprimands, write-ups or counseling for complaints made to management. (Tr. 992). Contrary to her complaint allegations filed with the undersigned, she had not filed a complaint with OSHA, initiated a proceeding nor testified in a proceeding before she was reduced in force. (Tr. 989-994; ALJX-5).

In her January 4 and 12, 2000, letters to the OSHA investigator, Complainant failed to mention that Mr. Lombardo, Ronnie Walling, Lance Marklinger or Jay Kleinheinze demanded she drive a CMV without a CDL or permit or with an inoperable speedometer or that she told Mr. Lombardo that she would go to DOT/OSHA. (Tr. 1005-1006, 1011-1012; RX-33; RX-34).

Complainant's facsimile dated November 22, 1999 to the OSHA investigator conveys suggested questions to pose to listed witnesses in support of her complaint investigation. (Tr. 1013; RX-32). The questions relate generally to electronic and paper logs and the alleged falsification of logs. Also on November 22, 1999, she faxed a list of questions for management witnesses, Roger Theis, Wayne Fulin and Guy Lombardo, which, for the first time, mentioned her refusal to operate a vehicle because to do so would constitute a violation of federal rules and regulations and because the vehicle was unsafe. (Tr. 1019-1021; XC-17-15 through XC-17-17a). Complainant persisted in alleging that she raised the issue of her refusal to drive an unsafe vehicle or drive without a CDL notwithstanding the absence of a finding by the Secretary with respect to such an allegation. (Tr. 1022-1023).

Robert Gomez

Mr. Gomez, a certified equipment operator, began employment with Respondent in January or February 1997. (Tr. 115). He attended the employer's training center in Kellyville, Oklahoma where he learned driving techniques and the proper way to perform manual or paper "logging." (Tr. 115-116). He confirmed that in June 1999 Complainant was his assistant Rockwell administrator until "business got slow" and she was laid off. (Tr. 123).

Mr. Gomez described his pre-trip procedures and noted that if he found something wrong with the unit, he would either report the problem to the dispatcher or an available mechanic. (Tr. 124). He testified that in May 1999 the Alice, Texas district was not "live" with electronic computer logging. Paper logs were used primarily by the operators, "everybody was going through growing stages with [electronic logging]... the calibrations were wrong." (Tr. 126).

Mr. Gomez verifies the operation of his speedometer during his pre-trip inspection while driving in the yard. (Tr. 132). If his speedometer "goes down during the road," and if he has the Rockwell on-board computer [Trip Master] which also reads speed, "you can still drive it like that because you're reading your speed off your Trip Master...." (Tr. 134). If the speedometer is not working, he reports the problem for repair. He further stated that if his speedometer is working and the Trip Master is not working, he goes by his speedometer. Id. He testified that he "probably wouldn't" drive a truck from the district with an inoperable speedometer, but if the speedometer becomes inoperable during a trip, he would drive to his destination and park the truck. (Tr. 136). He confirmed that he would not drive a commercial motor vehicle without a working speedometer. (Tr. 137).

He reviewed a Driver's Trip report dated April 10, 1999, which he prepared and signed describing defects in Truck No. 6470 as "CB Radio Don't Work, Rockwell Don't Work, Driver Don't Work." (XC-5, Z2, Bates No. 209). The form reflects that "instrumentation" was "o.k." during his pre-trip inspection. He stated that the dispatcher informed drivers to write up the units if they did not work and "they'll take care of it." He denied making the entry "Driver Don't Work," explaining "that's not my signature" or writing. (Tr. 145, 177). He further stated that he had never had problems with his speedometer not working during a pre-trip check, only the on-board computer. (Tr. 148).

He testified that upon completion of his post-trip inspection, he extracts information from the on-board computer and downloads the information into the main computer. He can printout the last seven days of logs that are carried with the driver, replacing the oldest daily log each day with the newest daily log. (Tr. 150). His blank paper log is not touched if the on-board computer is operational, but if the computer went out the paper log is used as a substitute or continuation of his driving duties. (Tr. 157). However, he does not maintain two logs simultaneously. (Tr. 162).

On cross-examination, he affirmed that the on-board computer is near the console and the Rockwell monitor can be read if his speedometer became inoperable. (Tr. 170-171). He acknowledged that Complainant was responsible as a Rockwell trainer for teaching the use of the electronic on-board computer system. (Tr. 172). He stated that an electronic log can be edited in the district office, but he has never seen an edited log. (Tr. 172-173). He testified that the on-board computer did not become "live" until after Complainant left Respondent's employment. (Tr. 174). He confirmed that no one has ever asked him to falsify his paper or electronic logs. (Tr. 175). He was not aware of anyone else being asked or forced to falsify logs. Id.

George Rinche

Mr. Rinche is an equipment operator who has also attended the Respondent's Kellyville, Oklahoma training center. (Tr. 183-184). He testified he has never driven a truck that did not have a working speedometer, but has driven units which had intermittent problems on a trip. (Tr. 187). He explained that there are two speedometers in a vehicle, one on the dash and the other from the on-board computer; "one or the other always works." (Tr. 188).

He also explained the process of logging onto the main computer with a card, extracting information onto the card, downloading the history onto the on-board computer in the vehicle

and placing information back into the main computer upon completion of a trip. (Tr. 190). He confirmed that he carried a blank paper log with him for about two months after the electronic logs "became live" in the event he had any problems. He would then begin using the paper logs from the point the electronic log became inoperative, but stated that he never had to resort to the paper log process. (Tr. 193). He testified that during the implementation stages of the on-board computers paper logs were used to maintain time and status. (Tr. 194). He was never told to falsify any logs at any time. (Tr. 199).

He too stated that he would use the on-board computer speed if the speedometer was not operative. (Tr. 206). If the on-board computer was not working, he would stop and "probably call a mechanic." Id. He has driven a truck without a working speedometer. (Tr. 207). He testified that he was not aware of any drivers who did not drive a truck because the speedometer was not working. (Tr. 209). He affirmed that if there was no way of knowing what speed a truck was moving, it would be unsafe to drive and he would not drive such a truck. Id. He stated that he would not drive such a truck even if his manager told him to drive; he would report the instruction to the manager's supervisor. (Tr. 210).

On cross-examination, he testified that during training Complainant informed him to insert his card in the on-board computer, never touch the keypad and turn in his card after six trips, which he did for about four to six months. (Tr. 212). Complainant told him he "was doing great." (Tr. 213). He stated that just putting his card into the on-board computer "extracts absolutely nothing...you have absolutely no data on the card." (Tr. 214). He was not downloading any information. Id.

He recalled a reduction in force at Respondent's Alice, Texas facility being "very large," but "it was in small waves." (Tr. 216). He has requested his electronic log be edited and has seen a printout of such editing. The editing is done on the main computer and the driver has to sign the log authorizing a manual edit of the logs. He has never been asked to falsify his logs. (Tr. 217-218).

Zachary Tamez

Mr. Tamez has been a certified mechanic for Respondent for three years. (Tr. 385-386). He testified that he recalls troubleshooting speedometers on vehicles, repairing, replacing and testing speedometers. (Tr. 386-387). He test drove the repaired speedometer on the highway. (Tr. 386). He also stated that all

gauges need to be checked while driving in the yard and, if the speedometer is not properly functioning, it needs to be repaired. (Tr. 397). He has repaired five speedometers in his three years of employment with Respondent. (Tr. 387). He also repaired on-board computers during the period from January through May 1999 under the direction of Complainant. (Tr. 388, 396). He stated the directions from Complainant were not always correct, such as incorrect wiring and numbers. (Tr. 389).

He traveled to Edinburg, Texas with Complainant to install on-board computers, but could not recall repairing any vehicles that had speed problems. (Tr. 392). He did not recall being asked by the Edinburg manager to drive a vehicle, but recalled refusing to drive a vehicle because he was not certified to drive a vehicle in that district or yard. (Tr. 392-393). He could not recall any drivers refusing to drive because of inoperable speedometers. Id. He also confirmed that the on-board computer could register speed if the speedometer was inoperable because of the "sensoring transmission." However, he recalled test-driving vehicles which did not have working speedometers and no recording on-board computer that required repair. (Tr. 394-395). He could not recall any drivers ever reporting simultaneously non-working speedometers and on-board computers between January to May 1999. (Tr. 396). He testified that if a speedometer was not operational, the vehicle would be unsafe. (Tr. 397). He was not aware of any drivers who were told they would lose their jobs if they refused to drive a vehicle that had an unsafe condition. (Tr. 399).

On cross-examination, he confirmed it is a rare event for a speedometer to become inoperable. (Tr. 400). He was not aware of any vehicle leaving the yard with a broken speedometer. He stated that Complainant never informed him that she was being asked to drive any vehicles. Id. He was not aware of any complaints made by Complainant about unsafe conditions. (Tr. 401).

Raphael Bocanegra

Mr. Bocanegra has been employed by Respondent since 1979, the last four years as a Professional Driver Trainer for the Laredo, Texas district. (Tr. 539-540). He testified that Laredo is still in the training stage and has not gone "live" with the Rockwell on-board computer system. (Tr. 540). He questioned Complainant "as to the legality of the electronic logs" during the training process, but she did not know the answer at the time. (Tr. 541-542). He attended a training class with Alan Melton, but Mr. Melton did not state that he should not listen to Complainant's instructions, or she did not know what she was doing or she did not know about DOT compliance with the electronic logs. (Tr. 542-

543). He confirmed that he and Complainant attended a meeting on or about May 3, 1999, with SGT Mario Salinas of the Texas Department of Public Safety to seek information about electronic logs. (Tr. 543).

Concerning Complainant's job performance, Mr. Bocanegra testified that when he asked her questions about training she did not seem to understand the log-in procedure. (Tr. 551). He stated he had no knowledge of any vehicles in the Laredo district that did not have speedometers. (Tr. 553). He affirmed that driving with a non-working speedometer is an unsafe condition. It is mandatory in his district that vehicles have working on-board computers before going out on a job, and if it is not working the driver should contact his supervisor about the situation. (Tr. 556).

He could not recall any drivers refusing to drive a vehicle because of a non-working on-board computer or speedometer during the period from January to May 1999. (Tr. 557). He did not recall Complainant ever complaining about electronic logs being falsified. (Tr. 561-562). He testified that the only incident where Complainant complained about DOT/OSHA rules and regulations related to drivers who worked over 15 hours, but he explained to her that they were not driving and were not "over-logged" in violation of DOT regulations. (Tr. 563, 564). He related that "oil field exemptions" applied in the industry which allowed more driving time when a driver encounters unforeseen conditions in a dispatch. (Tr. 564).

Guadalupe Wally Villerreal

Mr. Villerreal is a driver-trainer for Respondent at the Alice district and has worked for the Respondent for 25 years. (Tr. 1070). He worked with Complainant "doing some kind of calibrations." (Tr. 1071). He took the vehicle out with her to load parameters and check out the unit. Id.

He testified that Complainant asked him about DOT regulations and he thought she was not very familiar with the regulations. He could not recall Complainant ever stating that Respondent was out of compliance with DOT regulations. (Tr. 1072). He recalls that she told him she needed to get her CDL, but she was always so busy, [he] never heard anything more." (Tr. 1074).

He was a member of the loss prevention team and could not remember any RIRs submitted by Complainant or any issues about unsafe conditions, but if she had submitted 30 to 40 RIRs a month, he would have remembered. (Tr. 1076). He could not recall Complainant ever complaining that she was being forced to drive a

CMV without a working speedometer. He would not have allowed her to drive without a CDL. (Tr. 1077). He testified that during the downturn hundreds of people were lost and Complainant was one of the losses. (Tr. 1078).

Guy Lombardo

Mr. Lombardo works in the Quality, Health, Safety and Environment (QHSE) department for Respondent's Central Region which geographically includes the western half of Texas and the eastern half of New Mexico. (Tr. 224-225). He was transferred to Oil Field Services in January 1998, and became responsible for Respondent's driver monitor program. (Tr. 227). Respondent began assessing on-board computers in 1992 and thereafter selected and began installing Rockwell on-board computer software and hardware in early 1998. (Tr. 225-226). Installation of on-board computers continues to occur whenever a new truck is added to Respondent's fleet, and was on-going from January through May 1999. (Tr. 231).

Mr. Lombardo recalls seeing Complainant in person on five separate occasions during her employment with Respondent. (Tr. 1247). The first was at a June-July 1998 driver monitor implementation meeting in Corpus Christi, Texas at which Complainant expressed concern about using computer generated electronic logs that she claimed were not accepted by Department of Transportation (DOT). (Tr. 233-234, 1248). Complainant represented that she had spoken to DOT which informed her the use of electronic logs "was not correct, not legal, not DOT compliant." (Tr. 241). He recalled Complainant raised improper wiring harness problems in the past, but was not certain if such problems were raised at the June-July 1998 meeting. (Tr. 234). He affirmed that Respondent is an interstate carrier and "nothing is more important than safety." (Tr. 236).

Mr. Lombardo's second encounter with Complainant was in Laredo, Texas, during the first Quarter of 1999, at which they cordially spoke while passing in the hall of the Wireline District Office. (Tr. 1248). Complainant did not raise any complaints or mention any DOT or OSHA violations. (Tr. 1249).

Mr. Lombardo did not have direct supervisory authority over Complainant, but had authority over her supervisor. He was not in the supervisory chain of authority at the time of Complainant's reduction in force or termination. (Tr. 243). He testified that between March and May 1999, approximately 350 CDL drivers were employed in Central Region which had 350-400 CMVs. (Tr. 245). He confirmed that Respondent has issued a Driving Policy outlining the four major issues fundamental to the way Respondent manages driving

in its business. (Tr. 246-247; XC4-Z28, Bates No. 137). Mr. Lombardo testified that units were to be parked until on-board computers were installed and, in the event a unit had an inoperable computer, it was to be fixed before being placed in regular duty. (Tr. 248). An exception could be made by facility managers, if the unit was otherwise safe and the driver was safe, to permit its use and provide for paper logs in lieu of electronic logs. (Tr. 249-250). He stated if a unit does not have an operable speedometer, it should be fixed before the unit leaves the yard. (Tr. 252).

Mr. Lombardo confirmed that at the third meeting he and Complainant were in Edinburg, Texas simultaneously on a date he could not recall at which time he asked "how it was that [she] was the only one who . . . consistently found major flaws in the driver monitor program when everyone else seemed to be satisfied that it was working." (Tr. 254, 1250). He recalled Complainant insisting on showing him wires of an on-board computer that she represented was a flawed installation. (Tr. 255). He further recalled Complainant claimed "wholesale failures of the system," but he wasn't receiving any other indications that the system wasn't working to the magnitude represented by Complainant. (Tr. 255). He testified that "the rest of the organization seemed to be living and growing with the implementation of the Rockwell monitors, not without hiccoughs, not without growing pains, but certainly not with some of the conspiracies that [Complainant] were (sic) claiming that day." (Tr. 255-256). He could not recall Complainant complaining about unsafe conditions or OSHA or DOT violations. (Tr. 1254).

Mr. Lombardo testified he was never aware of drivers being forced to drive vehicles that had malfunctioning speedometers nor did he ever instruct any driver to drive a vehicle with a non-operative speedometer or on-board computer. (Tr. 257). He added that on-board computers are not a requirement of the DOT, but Respondent utilizes on-board computers for a number of reasons beyond DOT requirements. (Tr. 258). He denied that Complainant ever informed him logs were being falsified during the period from March to May 1999. He investigated every issue of "falsification" raised by Complainant and determined she was mis-using the term "falsifying." (Tr. 259). As an example, he cited a driver who forgets to input a location code when he stops for lunch which reflects a change of duty status and is an error of omission. (Tr. 260). The log can be corrected, with authorization from the driver, by editing in the proper location code. He never told anyone to falsify logs. Id.

He further confirmed that on or about May 24, 1999, he sent an e-mail to Complainant and Paul Rose requesting specific data for

the districts and set a deadline of May 26, 1999. (Tr. 266; RX-15). He received a response from Paul Rose in a timely fashion and testified that he has never received the data from Complainant in the format requested. (Tr. 266-267; RX-14). Complainant does not dispute that she failed to provide the data in the format requested. (Tr. 268; See RX-13).

On June 18, 1999, Mr. Lombardo requested Complainant's passwords for the district Rockwell computers which she monitored. (Tr. 263-264; RX-6). She never provided the report which he requested. With the passwords, he could access the district computers and download information he needed for a report. (Tr. 264). Complainant subsequently refused to provide the passwords over an insecure e-mail net, but agreed to provide the information in person. (Tr. 265; XC-6-ZJ, Bates No. 262). Mr. Lombardo admitted that he became angry over her refusal to e-mail the passwords but denied that he told Complainant that "your job will be lost." Id.

On June 21, 1999, Mr. Lombardo met with Complainant in Corpus Christi, Texas, their fourth person-to-person encounter, to discuss the information previously requested on May 24, 1999 and to "rate and gauge the implementation of the Rockwell monitor system in the South Texas locations." Id. The meeting lasted less than two hours. Complainant's contentions about the flaws of the driver monitor program were discussed to ascertain all of Complainant's concerns. He testified that he was interested in rating the districts and obtaining the quality of their implementations which was done jointly as reflected in his meeting notes. (Tr. 269, 274; RX-42). He denied informing Complainant that he was in charge of South Texas and that she "will follow my way," and he was "tired of hearing complaints about OSHA and DOT...there will be none done in my area." (Tr. 274).

Mr. Lombardo testified he had heard Complainant was pursuing a CDL and wanted support from Respondent, but he was not in favor of her being licensed. (Tr. 275). He denied directing Complainant to drive commercial motor vehicles on June 21, 1999. He also denied informing Complainant that if there were any more refusals to drive vehicles, she would lose her job. He denied that Complainant informed him she refused to drive a vehicle with no working speedometer, but noted he would never ask her or even allow her to drive a commercial motor vehicle on the highway. (Tr. 276-277). He denied Complainant stated that she was going to DOT and OSHA to file a complaint. (Tr. 278, 1254, 1263). He further stated Complainant never brought up OSHA at any time. (Tr. 1263). Mr. Lombardo recalled Complainant making claims about unsafe conditions which, after investigation, "turned out to be something

other than what she was saying," a matter of interpretation. (Tr. 278, 1255). Complainant's job involved reporting any alleged unsafe conditions or DOT violations. (Tr. 1256). One example cited was Complainant's complaint that Respondent was not in compliance with DOT logging regulations because of lack of security for the logs in that one driver crossing the parking lot with an electronic card to be uploaded in a district computer may contain data from two separate drivers. (Tr. 279).

Mr. Lombardo denied ever asking Complainant to edit electronic logs to match paper logs or vice versa. (Tr. 280-281; 1265). He testified that Complainant did not complain she was having to falsify logs. (Tr. 1264). He would not have terminated her for having so complained. (Tr. 1264-1265). However, he noted that an administrator's duty involves reviewing data and making repairs to logs when errors are made, which requires the driver to validate and sign the edited log. (Tr. 281). However, in June 1999, South Texas had not gone "live" with electronic logs, some districts/drivers were better than others, and there would have been no reason to demand Complainant "match" paper logs and electronic logs. (Tr. 1265-1266). In the event of an electronic log malfunction, paper logs would be used "to pick up where your electronic logs left off . . . to have one continuous reporting cycle," which is permitted by DOT regulations. (Tr. 1267-1268).

On cross-examination, Mr. Lombardo confirmed that the editing process is a legal action to make the log full and complete. (Tr. 282). Once edited, the log will reflect that it has been edited based on the design of the software. Because of the software design, DOT allowed Respondent to use the electronic logs. The on-board computer system is not necessary for DOT compliance. (Tr. 283). Mr. Lombardo testified that the electronic logging system is more efficient, less tamper-proof than paper, more secure, safer and less likely to be abused. (Tr. 284). He affirmed that driving with an inoperable on-board computer is not a DOT violation. Id. A vehicle speedometer and on-board computer digital system are independent of each other and it is possible that one would be working while the other may be inoperable. (Tr. 285).

Mr. Lombardo, who was newly responsible for the South Texas region, sought the status of the Rockwell implementation in that area for a report to his boss, Don Gawick. (Tr. 286). Because of the ongoing downsizing, South Texas was to become part of the Central Region and the staff of South Texas was either reassigned or reduced in force, to include Complainant's direct report supervisor, Roger Theis. (Tr. 287). He perceived Complainant as an installer and troubleshooter for the Rockwell monitors who covered the geographical areas of South Texas and the Southeast

States defined as East Texas, Louisiana, Mississippi, Alabama and Florida. (Tr. 288; RX-8, RX-9). In reorganizing into Central Region, two regions (South Texas and Southeast States) were eliminated, both of which were the responsibility of Complainant. Id.

He testified that Central Region did not need two driver administrators or managers. Central Region only needed one person to take the leadership role on the driver monitor program. There were two driver monitor program manager positions which had "to cascade down into one." (Tr. 1258). At the time, Paul Rose was the other driver monitor program manager based in Midland, Texas. Mr. Lombardo testified that Central Region did not need anyone to perform the job Complainant was doing in June-July 1999 in the South Texas region (installing and troubleshooting) and had no position for Complainant after her job in South Texas was eliminated. (Tr. 1259; RX-17, RX-18). He added that mechanics needed to treat the driver monitors just like any other part of the vehicle, such as the air conditioner or turn signals. (Tr. 289). He stated the program could not have sustainable improvement with someone "going behind every claim of a problem and fixing it for them," which was Complainant's duties. (Tr. 290; RX-9).

Currently, mechanics are performing maintenance on the driver monitors and Paul Rose is engaged in database interpretation and feedback to managers. He added that steady improvement in the system has occurred since Complainant was reduced in force. (Tr. 290-291). Mr. Lombardo testified that he never agreed with the approach taken in South Texas of having a specialist going around to be the "fix-it person" every time a driver monitor became inoperable. (Tr. 292). Paul Rose, on the other hand, deals with managers, accessing computers, evaluating data, printing out information, gauging and ranking data for feedback to the district managers as a measure of their performance. (Tr. 292-293).

On May 26, 1999, Mr. Lombardo received an e-mail from Complainant which provided out-of-date information in response to his May 24, 1999 request for driver monitor data. (Tr. 311-313; RX-13, 14). He also received a spreadsheet from Paul Rose on May 26, 1999, detailing the exact information requested which was extracted from the district computers by accessing the computers through the "Timbuktu" system and the use of passwords. (Tr. 313-315; RX-14, RX-26). He stated that is why he needed the password information requested of Complainant on June 18, 1999, to allow access to the district computers. (Tr. 315, 328; RX-6). As of June 21, 1999, he had not received the data requested of Complainant on May 24, 1999. (Tr. 1261-1262). He denied receiving RX-54 which purports to be a list of passwords from Complainant.

(Tr. 1273).

On June 15, 1999, a "Tripmaster Meeting" was scheduled on June 29-30, 1999, by Neil Campbell to discuss current problems from the field, that would "require solid field input," about which Mr. Lombardo sought data from Complainant on June 21, 1999. (Tr. 295; RX-12). He testified that before June 15, 1999, he had decided that he had no position for Complainant in Central Region, but Respondent was looking for other opportunities for Complainant. (Tr. 297-298; RX-8, 9 and 10). He testified Complainant's job was eliminated as part of the ongoing reduction in force which began on September 2, 1998. (Tr. 303; RX-28, 29). He affirmed that the South Texas Region was the last exploration and production province in North America to feel the effects of the downturn, which "was not as deep as it was in ... West Texas." (Tr. 304-305). West Texas "took an 80 percent reduction in Midland for the Permian Basin West Texas." (Tr. 305). Complainant was not the only South Texas employee to be laid off, which may have ranged as high as 60 of 300 employees. (Tr. 305). In less than one year, the area of Central Region, formerly known as South Texas, now employs 450 to 500 employees, the vast majority being commercial motor vehicle drivers. (Tr. 309). However, no one was hired to perform the duties previously performed by Complainant. Id.

At the June 21, 1999, meeting, Mr. Lombardo pursued claims made by Complainant of flaws in the driver monitor system because she had a history of making blanket statements about Respondent being "illegal and . . . falsifying" without support but "repeated often enough were beginning to be heard." (Tr. 318-319). He testified Complainant's claims had nothing to do with the decision to select her for reduction in force. (Tr. 319). He had made the decision before the June 21, 1999 meeting that there was no job for her in Central Region, although Respondent continued to search for alternative positions in Eastern Region. Id.

Mr. Lombardo last saw Complainant on June 23, 1999, in Alice, Texas, while accessing e-mail in the engineer's room. Complainant was present but did not threaten to go to DOT or OSHA nor complain about falsifying records. (Tr. 1272). He stated he became aware of personality conflicts between Complainant and other employees from time to time which were always a matter of "interpretational disagreement." (Tr. 1279). He never believed that any of the personality conflicts were related to Complainant's complaints about DOT or OSHA violations. (Tr. 1280).

Mr. Lombardo denied receiving or having knowledge of Complainant's Exhibit XC-36 (1) and (1a)(Bates Nos. 972-973) which is dated May 19, 1999, and represents a catalog of complaints

allegedly raised by Complainant. (Tr. 1288). He testified however that such complaints are matters that Respondent would expect Complainant to report. (Tr. 1289).

Alan Melton

Mr. Melton is a full-time contractor for Respondent who is in charge of the driver monitor program for North America. He works for Neil Campbell, the "NAM" transportation manager. (Tr. 334). He affirmed that he believes in safety and puts safety first. Id. He first met Complainant in June-July 1998 at a training class he conducted in Alice, Texas. (Tr. 335). He stated that the implementation of the Rockwell system began in June 1997 for both hardware and software. (Tr. 336).

He does not oversee the system administrators who work for the managers of each location. He supports and trains the system administrators. (Tr. 340). He did not recall stating to a training class in December 1998 that Complainant "does not know anything. Do not answer or listen to her." (Tr. 342). He did not recall any units shorting out on the on-board computer. (Tr. 343). Nor did he recall any on-board computers which did not have operable speedometers during the period from July 1998 through July 1999. (Tr. 344). He confirmed that speed on the on-board computer can record even though the speedometer on the vehicle dash may be inoperable. Id.

He recalled Complainant complained to him that Respondent's procedures developed for electronic logs were not in agreement with her perception of the DOT regulations [49 C. F. R. § 395.15, Automatic on-board recording devices](XC-10-1, Bates No. 709). He did not recall Complainant ever stating that she had contacted DOT personnel. (Tr. 345). He stated that location sites for electronic logs are identified by use of location codes, such as zip codes used by Respondent, or the use of a Global Positioning System. He recalled Complainant arguing that zip codes could not be used as location sites. (Tr. 347).

He testified the location of mounting installs on the on-board computer were the decisions of the location managers. (Tr. 351). He is not responsible for DOT compliance for Respondent's on-board computer system. (Tr. 352). He affirmed that vehicle dash speedometers and on-board computers are two separate and independent systems and one or the other can be working. (Tr. 353, 357-358).

He stated that if on-board computers were not working properly, safety of the vehicle would not be affected. (Tr. 356).

Complainant never told him that she thought electronic or paper logs were being falsified by Respondent. However, he believed Complainant had a misconception that editing or correcting an electronic log was "falsification" of the log. Editing of an electronic log may occur only by a system administrator under DOT regulations. (Tr. 360). An edited log can easily be identified as manually edited or corrected when printed out. Id. He was not concerned with one driver possessing an electronic card with another driver's data since it is similar to "carrying his paper log book into the office." Electronic data is stored on the electronic card by driver number and such data could not be changed on the on-board computer. (Tr. 361-362). Mr. Melton testified that DOT regulations permit a combination of paper and electronic logs with the on-board computer. An on-board computer system goes beyond the requirements of the DOT. (Tr. 362).

He testified that Complainant complained about the installation of "PTO" [power take off] switches on the on-board computer to automatically record data without the intervention of the driver. (Tr. 363). Fuel consumed in PTO operations is non-taxable fuel because the vehicle is not driving over federal highways. (Tr. 364). PTO operations do not affect the safety of the driver or his unit. To his knowledge, there have been no "large wholesale failures of the Rockwell system" during installation. Id.

He testified that system administrators are charged with evaluating data from the vehicles/computers to determine if drivers are operating within the Respondent's policies for speed and DOT compliance. Such data is used by the manager or the maintenance department. (Tr. 366). An administrator should not be repairing and troubleshooting installations, which is the job of a mechanic. He stated that the initial reason Respondent began the driver monitor program was for driver safety and improvement. (Tr. 367). Speed on the on-board computer can be checked in the district yard since speed registers when the vehicle "starts moving." (Tr. 368). He did not recall drivers complaining that the speed recorded on the on-board computer was not accurate nor having any calibration problems with the on-board computers. (Tr. 371-372). He had no recollection of Complainant test-driving units. (Tr. 374).

Mr. Melton affirmed there is no safety issue if an on-board computer is not properly calibrated since the dash speedometer is calibrated. (Tr. 375).

Edward Paul Rose

Mr. Rose testified that he has been the Driver Monitor Project Manager for Central Region since January 1999. (Tr. 403). His job duties involve monitoring three local administrators to ensure their performance and training employees in the operation of the monitors. (Tr. 404, 435). He was hired on July 30, 1993 as an open-hole operator which required a CDL. Id.

He testified that in December 1998 he began learning the Rockwell hardware and software system and calibrating vehicles. (Tr. 404-405). He attempts to calibrate the speedometer and on-board computer to within three miles per hour of each other. (Tr. 407). He affirmed that the on-board monitor can register speed even though the dash speedometer may not be functioning. (Tr. 408). He confirmed that he would not drive a vehicle without a working speedometer, however he has never been asked to drive a vehicle without a working speedometer. (Tr. 409-410). He had no knowledge of any drivers refusing to drive vehicles because of non-working speedometers or on-board computers. (Tr. 412).

In conjunction with an e-mail from Complainant to Rose dated April 6, 1999, he stated that she had concerns about the driver monitor program and how it related to DOT rules and regulation that she wished to discuss in a meeting with Neil Campbell. However, he could not recall Complainant discussing any unsafe conditions. (Tr. 419; XC6-31, Bates No. 427).

On cross-examination, he clarified that the monitor installations and re-calibration issues raised by Complainant were related to driving safety. (Tr. 424). He does not recall Complainant ever relating any concerns about driving safety. (Tr. 425). He testified that his perception of Complainant's concern over "log falsification" was the editing process. (Tr. 425-426). Editing of downloaded information on electronic logs can only be done by the systems administrator and must be signed by the driver. (Tr. 427-428). He stated that his perception was that Complainant believed "the act of editing data [was] essentially falsifying logs." (Tr. 429). He further testified that editing logs was not a safety issue. (Tr. 430). He affirmed that only data inputted by the driver, such as "on-duty/now driving or on-duty/change-of-duty status," could be edited, not the driving period or hours. (Tr. 431-432).

He responded to Mr. Lombardo's May 24, 1999, request for information on May 26, 1999, and attached a spreadsheet detailing the information. (Tr. 433-434; RX-14, RX-26). Although the spreadsheet reflects a date of April 24, 2000, he testified that is

the date the sheet was printed for this litigation and not the date he prepared the document. (Tr. 434-435). He stated that he gathered the specific information set forth in the spreadsheet by using the "Timbuktu" system of accessing remote computers and "pulling the data off of them." (Tr. 436).

He assumed responsibility for the administration of the Rockwell system in South Texas after Complainant's reduction in force and found the system to be in poor condition at that time. (Tr. 437). He also observed that the drivers were poorly trained, the local administrators were improperly trained and most drivers in the South Texas area were not using the system, all of which were the responsibility of Complainant. (Tr. 438).

Patrick Schneider

Mr. Schneider is the Operations Manager for the Alice district which includes Victoria and Mission, Texas. (Tr. 452). He testified that Respondent's driving policy was adhered to in his district from October 1998 through June 1999. (XC-4-Z28, Bates No. 137). Complainant came under his supervision initially on September 15, 1998, as system administrator for the Rockwell on-board computer, but was placed under the supervision of Roger Theis, QHSE for South Texas, in the fourth quarter of 1998. (Tr. 453, 478). At that time, his district was in the process of implementing the Rockwell on-board computer system. The system administrator for the on-board computer system reported to Bill Greer, QHSE Staff Engineer during the period from January-June 1999. (Tr. 454, 465).

He was sure Complainant reported unsafe conditions to Mr. Greer because it is "everybody's responsibility to report any unsafe conditions so we can fix them." (Tr. 455). He stated that in his personal opinion a speedometer not working is not an unsafe condition. (Tr. 455-456). He affirmed that fatigue hours, over-logged hours, are an endangerment and an unsafe condition. (Tr. 457). He is unfamiliar with Rockwell software for electronic logs. He affirmed that his district was not "live" on the on-board computer system between January-June 1999. (Tr. 458). He was aware that Guy Lombardo oversaw the Rockwell program in South Texas in June 1999. He testified that Complainant did not report any non-working speedometers to him, nor did she report any fatigue or over-logged hours of drivers. (Tr. 462-464).

He was aware that Bill Greer edited electronic logs between January-June 1999, but could not recall a request for a meeting by Complainant to discuss safety, DOT/OSHA rules and regulations and editing logs. (Tr. 466). He never gave Complainant any write-ups

for discipline and was never angry with Complainant during his supervision of her work. (Tr. 467). He testified a RIR is completed by employees to identify any safety concerns. There is no standard period for retaining the RIRs. The form is reviewed by a committee for corrective actions. (Tr. 469). He did not recall any RIRs presented by Complainant about concerns of vehicle safety. (Tr. 471).

He could not recall any DOT drivers refusing to drive a vehicle during the period from January-June 1999 or driving a vehicle with a non-working on-board computer. Id. He could not recall an open forum meeting on May 18, 1999, where Complainant raised unsafe conditions of the on-board computers. (Tr. 472-473). He had no recollection of Complainant asking to complete her CDL or having a CDL. (Tr. 476). He testified that he did not ask Complainant to drive a commercial motor vehicle and was not aware of anyone else asking her to do so. (Tr. 477).

On cross-examination, Mr. Schneider testified that Complainant was moved from his supervision to Roger Theis because the implementation of the Rockwell system was being monitored by QHSE. (Tr. 478-479). He affirmed that in the fourth quarter of 1998, a reduction in force was in progress. (Tr. 480). It was well known in December 1998 that employees were going to be laid off in the Alice operation. (Tr. 491). He stated that the "equivalent head count" for the Alice District was 250 individuals, which had dropped to 130 employees by the third quarter of 1999. (Tr. 480-481). In August 1999, the business began experiencing a "turning up." He stated the market turned around very quickly which was not typical and very unexpected. (Tr. 481).

He testified that Respondent provides a wide range of services to customers which enable them to search for and produce oil and gas. Respondent's business is driven by the activity of its customers and the price of oil and gas. The Alice operation lost money from the end of 1998 until December 1999. (Tr. 482). Complainant's position was eliminated due to the reduction in force in July 1999. To his knowledge, after December 1998, Complainant was troubleshooting the Rockwell system and working with mechanics to install the on-board computer monitors. (Tr. 483). Paul Rose assumed the responsibility for the Rockwell system after Complainant was reduced in force. (Tr. 484). Mechanics began troubleshooting and correcting installation problems since the on-board computer was considered "just another piece of equipment on the truck." (Tr. 484-485). Danny Torres, the Alice dispatcher, has performed the dual functions as a system administrator since February 2000. (Tr. 485-486).

Mr. Schneider encourages employees to report unsafe conditions or acts and to stop an operation if they deem it unsafe. (Tr. 487-488). No employee has ever been terminated for reporting a safety condition. (Tr. 488). He testified that Complainant had disputes with other employees over directing maintenance assignments for Rockwell systems when the maintenance supervisor had placed priority on other assigned tasks. (Tr. 493). He received feedback from the maintenance supervisor but did not believe her actions caused hostility from members of the mechanics group. (Tr. 493-494).

Mr. Schneider testified that although he had authority to hire and fire employees, he did not participate in the decision to terminate Complainant because she was not part of his operation when selected for reduction in force. (Tr. 496). He testified that no employee was hired to replace or perform the functions of Complainant. (Tr. 498). He stated that Complainant was directed to edit electronic logs if erroneous readings occurred from the Rockwell system such as a vehicle traveling at 100-120 miles per hour. (Tr. 498; See XC-6-53, Bates No. 456). He could not recall Complainant ever refusing to edit electronic logs. (Tr. 499).

Wayne Fulin

Mr. Fulin, who is the QHSE manager for U. S. Land, moved from Mexico City to the United States effective April 1, 1999. (Tr. 501, 502, 1115).

He met Complainant for the first time on April 30, 1999, at a meeting where the main objective was to introduce himself to her and Karl Adami. (Tr. 502). At the meeting, he does not recall Complainant requesting a job evaluation or going over OSHA/DOT rules and regulations. (Tr. 503-504). He informed Complainant that the Rockwell system and safety would be his concerns as QHSE manager. (Tr. 504-505). He did not recall Complainant raising issues about the Rockwell hardware, improper wiring or speedometers not registering on the system. (Tr. 507). He stated that he did not recall Bill Greer commenting that the Alice district was not in DOT compliance and that he did not have the time necessary to do the job as system administrator. (Tr. 508-509). He did not recall Complainant stating that the electronic logs were not in compliance with DOT/OSHA rules and regulations or giving him any documentation or photos at the April 30, 1999 meeting. (Tr. 509, 511). He acknowledged that in March 1999 Complainant e-mailed concerns about units not working properly on the on-board computer system. (Tr. 512; XC-6-52, Bates No. 454). He reviewed the 15 photos comprising XC-20 and stated he did not recall seeing the photos at the April 30, 1999 meeting. (Tr. 514-515). He could not recall Complainant

asking for management's support to review training issues on the on-board computers. (Tr. 516).

Mr. Fulin testified that he was not aware of units with inoperable speedometers and did not recall Complainant informing him of non-working speedometers. He did not recall Complainant ever informing him that drivers were refusing to drive vehicles. (Tr. 520).

On cross-examination, Mr. Fulin testified that at the April 30, 1999 meeting Complainant would not have known of the reorganization of the Respondent, but would have known of the business downturn which began in mid-1998 and resulted in several reductions in force. (Tr. 521-522). He did not know of the reorganization either, but a reduction in force had begun. (Tr. 530, 1119). The downturn was related to the price of crude oil in the drilling industry. Prices began in the range of mid-$20 per barrel of oil and were down to $10 per barrel by the end of 1998. The drop off was fairly quick, extreme and unexpected. (Tr. 523, 1116). He described the Respondent's business as "dynamic," "volatile and competitive." (Tr. 527).

He testified that Respondent is divided into areas. U. S. Land is a geo-market comprising the entire United States and is part of NSA (North and South America). Complainant's position was part of U. S. Land from July 1998 to July 1999. (Tr. 524, 1117). U. S. Land was further divided into five regions: Northeast, headquartered in Charleston, West Virginia; Mid-Continent, headquartered in Oklahoma City, Oklahoma; Western, headquartered in Denver, Colorado; West Texas located in Midland, Texas; and South Texas/Southeast located in Corpus Christi, Texas. In an effort to gain efficiencies and reduce costs, Respondent began evaluating a reorganization of the company in early April 1999 and a decision was made to combine regions down to three in May 1999. South Texas was absorbed by West Texas to become Central Region and Northeast and Southeast regions were absorbed into Eastern with Western remaining intact. Mr. Fulin was transferred in as part of the reorganization. (Tr. 525, 1117).

He stated the downturn began to turn around at the end of the third quarter of 1999. (Tr. 527). Analysts predicted the downturn to last for two years consistent with the Respondent's indications, however "nobody expected it to rebound when it did." (Tr. 528). A total of 30% of U. S. Land's employees was lost as a result of the reduction in force. (Tr. 529). After reorganization, two system administrator positions resulted. The management team of Don Gawick, the line manager, and Guy Lombardo in Midland, Texas decided only one system administrator was needed for Central

Region. (Tr. 531). He stated that Complainant's job involved participating in installations with mechanics and troubleshooting-type issues. However, the program was evolving to the actual installation and hardware maintenance being performed by the mechanics and electronic technicians at each location which has proved to be a more efficient way to operate. (Tr. 533).

According to Mr. Fulin, Complainant's position was eliminated solely as part of the downturn and reduction in force. The reorganization made her position a "duplicate" and installations were actually being done by the mechanics. Mr. Fulin made efforts to find Complainant a position to which she could transfer in the Northeast region, but without success. (Tr. 533-534). He stated he would have recommended Complainant for the position if one had been available because she was a hard worker and he had received mostly positive feedback from location managers about her work. (Tr. 534).

He testified that Complainant never complained to him about being told to drive a vehicle even though she did not have a commercial driver's license or that she had been told to drive a vehicle with a broken speedometer. Id. She never informed Mr. Fulin that she had been asked to do anything unsafe. (Tr. 534-535). He further testified that Complainant never informed him that she was being forced to edit either electronic or paper logs in a manner that she did not agree with or that she believed electronic or paper logs were being falsified. He affirmed that Complainant never told him she believed Respondent was violating DOT or OSHA regulations or that she was going to report Respondent to DOT or OSHA. (Tr. 536).

In Respondent's case-in-chief, Mr. Fulin testified that Respondent's reorganization was an effort to reduce costs and eliminate overhead and gain efficiencies. (Tr. 1121). Reorganization began in mid-May 1999 and was caused by the downturn in the oil industry which also caused the reductions in force. (Tr. 1122, 1137-1138). The decision to reorganized was made by a group of upper level management, line/operations managers and geo-market managers. (Tr. 1123). Regional managers, such as Don Gawick of Central Region, were responsible for implementation of the decision and downsizing the business. (Tr. 1124). The five existing regions were combined into three regions: western, eastern and central. (Tr. 1128; RX-50).

Prior to reorganization, there were three area Rockwell systems administrators: Complainant in South Texas/Southeast, Paul Rose in Midland, who also covered Mid-Continent, and Don Sikorski in the Northeast. (Tr. 1133-1134). On May 19, 1999, Guy Lombardo

e-mailed Mr. Fulin indicating Paul Rose had been selected to handle the system administrator duties for central region since only one administrator was needed and inquired about similar duties for the eastern region and recommendations for Complainant. (Tr. 1141-1142; RX-18). Mr. Fulin agreed with the decision that only one administrator was needed for the central region, since in gaining efficiencies there was no reason to have two system administrators in the same area. (Tr. 1142-1143). Mr. Fulin responded to Lombardo that he was not certain Complainant could be used effectively for the eastern region without a physical move which would necessitate a moving expense, an additional cost. (Tr. 1143-1144; RX-19). It was not financially feasible for an employee in South Texas to serve the rest of the United States. (Tr. 1144).

On May 21, 1999, Mr. Lombardo informed Mr. Fulin that Complainant was not needed in central region and sought options or recommendations for Complainant. (Tr. 1145; RX-17). Mr. Fulin testified that although Complainant had one year of experience, other employees with 20 years of seniority with Respondent were reduced in force, including Roger Theis, the QHSE manager for South Texas and Complainant's supervisor. (Tr. 1146-1147). Mr. Fulin sought unsuccessfully to re-locate Complainant in the eastern region, which was retaining Don Sikorski as system administrator. (Tr. 1149-1151). On June 17, 1999, he advised Mr. Lombardo that if he did not feel he needed Complainant in central region to "go ahead and let her go." (Tr. 1151; RX-10). Mr. Fulin testified that he had no knowledge that Complainant had complained about any safety or DOT violations. Id.

He stated he made a good faith effort to find Complainant a job in another region but without success. Although there were varying opinions about Complainant's performance, as Mr. Lombardo noted, performance was not the main issue in the decision not to retain her in central region. There was no need for a duplicate position in the region. (Tr. 1152; RX-9). Mr. Lombardo did not believe a system administrator should be doing on-board computer installations, which was the job of the mechanics. Of the system administrators, only Complainant was performing troubleshooting and supervising on-board computer installations and repairs. (Tr. 1153-1154). Mr. Fulin agreed that the Rockwell system should be maintained as just another piece of equipment that is handled by the mechanics and electronic technicians. (Tr. 1154-1155). He testified that Complainant's job functions were redundant to the mechanics and electronic technician's job and was not a necessary function for Respondent to become efficient. (Tr. 1155).

As of June 17, 1999, a decision was made that the job of Complainant would be eliminated in the reorganization by reduction

in force. Id. The reduction in force did not occur until July 6, 1999, because Mr. Fulin hoped to find a position for her in other areas and sent her out to other areas to do installations. He testified that Respondent was "starting to get to the point where...there was no installations to do. And there was no job. So the decision was made then." He affirmed that not only did Complainant's position need to be eliminated, there was no more work for her to do. (Tr. 1156).

On July 6, 1999, Mr. Fulin met with Complainant in Alice, Texas to discuss the future of her position. He informed her that due to the downturn in the industry and the reorganization, her job had been eliminated. (Tr. 1160-1161). She commented that with her background and credentials she did not think she would have a problem finding employment. Mr. Fulin testified that she did not threaten to go to DOT or OSHA and did not raise any complaints about safety, DOT or OSHA violations. She did not claim that she had been forced to falsify logs or that Mr. Lombardo had been hostile to her or demanded that she drive a commercial motor vehicle with a non-working speedometer even though she did not have a commercial driver's license. (Tr. 1161-1163). He denied telling Complainant that "now she would have time to spend with her kids." (Tr. 1164). Mr. Fulin confirmed that, at the time of the implementation of the decision to terminate Complainant, he had no knowledge that she was claiming to have made a complaint to DOT or that she would go to DOT or OSHA to complain. He stated that he did not know she was a "disgruntled employee." (Tr. 1166).

Mr. Fulin testified that he never received Complainant's report of May 19, 1999, addressed to "Wayne," without an address, in which Complainant lists various complaints about improper wiring of hardware, improper training, over-logged DOT drivers and broken company policies with suggested safety corrections. (Tr. 1167; RX-36-1, 36-1a). He stated that he first saw the document during the first OSHA investigation conducted on January 10, 2000, by Ms. Rosanna Nardizzi. (Tr. 1168). Complainant acknowledged that she hand-delivered the May 19, 1999 letter to the Corpus Christi office but Mr. Fulin was not present. (Tr. 683). Mr. Campbell, Ken Bryson and Mr. Lombardo had been copied with the report, but had not seen the report before the OSHA investigation. (Tr. 1169). He also testified that he did not see Complainant's letter addressed to Ms. Linda Clark dated June 26, 1999, wherein she raised similar complaints and a fear that Mr. Lombardo "is trying to terminate my position as a (sic) Area System Administrator" until preparation for the instant litigation. (Tr. 1170; RX-35-1, 35-1a).

Mr. Fulin identified a chart of gross revenue and head count for the time period January 1998 through December 1999 for U.S.

Land central region as a true and accurate reflection of Respondent's status. (Tr. 1173-1174; RX-49). The data represents a combination of South Texas and West Texas or central region and was derived from the Profit and Loss Statement maintained by the Respondent's Controller. (Tr. 1175, 1189). He testified that revenues "bottomed out" in May 1999 which had a direct correlation to profitability. (Tr. 1178-1180). Industry specialists were projecting a two-year downturn according to Mr. Fulin. (Tr. 1185). In response to the downturn, Respondent was cost-cutting materials, travel and compensation, which is the highest cost but one Respondent had the most control over. (Tr. 1180). As of May 1999, U. S. Land had lost about $6 million, year to date. Id. Although an increase in revenues and head count is reflected in June 1999, such data would not have been available until mid-July 1999 according to Mr. Fulin. (Tr. 1182). The increased head count in the third quarter of 1999 was new field personnel such as drivers/operators, not support personnel according to Mr. Fulin. (Tr. 1183). Field personnel are considered "money-makers," or direct-revenue people, not "money-users" as are support personnel. (Tr. 1184).

Mr. Fulin described Respondent's operation as "volatile" in that the oil industry is dynamic and extremely competitive. Respondent is still looking for ways to be more efficient. He stated that a reduction in force occurred in GeoQuest one and one-half months before the instant hearing involving eight or nine employees in one department, and an operation in Michigan was closed down because of a lack of a long-term future. (Tr. 1188). The business environment "requires constant tweaking." Id.

Mr. Fulin also identified a chart reflecting profitability and loss in net revenue. (Tr. 1190-1191; RX-47). The chart reveals that in the fourth quarter of 1998 Respondent was down to 931 employees from a high of 1244 in the first quarter of 1998 and operating at a loss of $511,000. (Tr. 1192). By the first quarter of 1999, Respondent had sustained a loss of $1,454,000, retaining 782 employees. As the downturn continued and cost-cutting measures were implemented with a reduction to 643 employees, the second quarter of 1999 loss of $539,000 was not as steep because of a reduction in costs not necessarily an increase in revenues. (Tr. 1193-1194). In the third quarter of 1999, a profit of $592,000 was shown with an upturn of field personnel to 701. (Tr. 1194). Profitability was again reached in the fourth quarter of 1999 with an upturn to 792 employees and $3,986,000 in net revenues. Id. Mr. Fulin testified that Complainant's position and job functions would not have been a necessary part of the operations in the third or fourth quarters of 1999 to justify reopening the position. (Tr. 1195).

Mr. Fulin testified that operations managers and marketing managers use rig-count date to analyze the trends in the oil industry business. (Tr. 1197). He identified RX-51 dated May 5, 2000, as reflective of a publication which is widely accepted in the oil field industry as accurate data of U. S. and North American rig counts. (Tr. 1198-1199). A comparison of the rig counts discloses that in March 1999 there were 526 rigs whereas in March 2000, 773 were operating, a net increase of 247 rigs. Mr. Fulin testified that the increase of rigs does not change any of the decisions made about reorganization which has proved to be progressive rather than damaging to Respondent's business. (Tr. 1200). Respondent's Exhibit 52, the Baker-Hughes rig counts, reveals essentially the same increase in rig counts over the last year. (Tr. 1202-1203). Lastly, Respondent's Exhibit 53 is a graph depicting rig count and gas production from 1993 through 1999 which shows rig activity at a low in July 1999. (Tr. 1204-1205; RX-53).

Neil Campbell

Mr. Campbell has been employed by Respondent for 21 years. He has been the North American Transportation Manager since March 1998. He testified that he is responsible for the direction of training on the on-board computers, but not their implementation. (Tr. 571).

He was not aware of any DOT drivers refusing to drive vehicles that did not have working speedometers or on-board computers. He also had no knowledge of any drivers who drove vehicles with non-working speedometers or on-board computers and who were not terminated. (Tr. 572). He does not routinely see RIRs which are filed by employees with the loss prevention teams at location sites or with field supervisors. He has never seen a RIR filed by Complainant nor a RIR describing an unsafe condition of a vehicle by a DOT driver. (Tr. 575). He knew Complainant had concerns only "through word of mouth," but had received no direct reports of problems. Id. He recalled attending one meeting where Complainant was present on or about July 20, 1998, in Corpus Christi, Texas, but did not recall any safety concerns or problems identified. (Tr. 576, 1082-1083). The purpose of the meeting was to receive an update on the status of the Rockwell installations in the Alice, Texas district. (Tr. 1083).

He testified that he received an e-mail from Complainant on March 30, 1999, wherein a meeting was requested to discuss DOT regulations and electronic logs. (Tr. 580; XC6-48, Bates No. 447). On April 7, 1999, he responded that a meeting should be set up which should include Mr. Fulin since he was her boss, but he did not receive another e-mail from Complainant until June 8, 1999,

which had nothing to do with the requested meeting. (Tr. 582; XC-6-25, XC-6-27, Bates Nos. 421, 423).

Mr. Campbell never had any complaints about Complainant's work performance and was not involved in the determination to eliminate Complainant's position or reduce her in force. (Tr. 592). He was not asked for any input in the decision. (Tr. 1082).

On cross-examination, he testified that DOT approved the Respondent's use of the Rockwell system for installation and implementation. (Tr. 595). An on-board computer system is not required by DOT which will accept both electronic and paper logs. (Tr. 596). He testified that Complainant never complained to him that electronic or paper logs were being falsified or that she was told to operate a vehicle that did not have a working speedometer. (Tr. 597-598). He confirmed that he would not allow anyone to drive a vehicle who did not have a commercial driver's license. (Tr. 598). Complainant never complained to him that she was told she would have to drive a vehicle whether she had a driver's license or not. Id.

Mr. Campbell testified that the corporate driving policy came out in 1997 announcing that all vehicles would have a vehicle monitor installed by the end of 1998. (Tr. 599; XC-4-Z28, Bates No. 137). The monitor was installed to measure a driver's performance from a safety perspective; the recording of electronic logs was a side benefit of the system. The monitoring system was not required by DOT. He stated that it is not unsafe to drive without a monitor installed. (Tr. 600).

After Complainant was reduced in force, he attended a meeting on August 17, 1999, at the request of Liese Borden of Personnel where Complainant was present. Complainant's letter dated July 9, 1999, addressed to Mr. Euan Baird, Chairman, President and CEO of Respondent, was the focal point of the meeting. (Tr. 1087; RX-30). Mr. Campbell confirmed that the geo-markets were consolidated in May 1999 and that downsizing was on-going from the fourth quarter of 1998 through the fourth quarter of 1999. (Tr. 1087-1088). He attended the meeting on August 17, 1999, in an effort to find out more of the substance of Complainant's letter. He confirmed that Complainant's letter to Linda Clark dated June 26, 1999 and her letter dated May 19, 1999, were not raised or discussed during the August 17, 1999 meeting. (Tr. 1089-1090; XC-35-1, XC-36-1a, Bates Nos. 970, 972). He also stated that he had never received either of the letters. (Tr. 1091). He was present for one hour of the meeting after Ms. Borden and Complainant met for two hours alone. (Tr. 1093). The only concerns raised in his presence were Respondent's support for Alan Melton rather than Complainant and

her belief that drivers were not completing electronic or paper logs correctly. (Tr. 1093-1097). He denied stating that Paul Rose was retained and she was reduced in force because she went to DOT and he did not. (Tr. 1103-1104). He acknowledged that he had seen Complainant's Exhibit XC-31-1 which listed various issues that may have been used as an agenda for the August 17, 1999, meeting with Ms. Borden. (Tr. 1107; XC-31-1).

Bill Greer

Mr. Greer is the QHSE coordinator for Respondent at its Alice, Texas district and has been so employed since July 1998. (Tr. 1034). He worked with Complainant since the Rockwell system fell under the safety structure for which he was responsible. (Tr. 1036). He could not recall any RIRs filed with him by Complainant in 1998 or 1999. Id. He has been a member of the loss prevention team since July 1998 and could not recall an instance where Complainant raised a safety complaint, but should recall since safety is his responsibility. (Tr. 1038). He could not recall Complainant ever raising any safety concerns or unsafe conditions during any safety meetings. (Tr. 1039-1040).

After Complainant was reduced in force, he and Wally Villarreal became responsible for the Rockwell system administration. (Tr. 1041). Mechanics and electronic technicians continued to perform installation and repair functions. (Tr. 1050). He was informed that his job on the system was to take care of the computer end-editing logs and inputting new employees. Id. Complainant performed the editing process before her reduction and never complained to him that she was asked to falsify electronic logs. (Tr. 1041-1042). He confirmed that he has never been asked to falsify electronic logs. (Tr. 1042). He testified that Complainant never complained to him that she had been told she would have to drive a commercial motor vehicle that did not have a working speedometer or that was unsafe. Id.

He testified that he had no recollection of any fires involving units with installed Rockwell monitors. (Tr. 1046). He stated that he recalled a battery and wiring problem but denied that there were ever 40 vehicles down with dead batteries at one time; perhaps a total of ten, two or three at a time. The situation was corrected. (Tr. 1047-1048).

He recalled that during the period from July 1998 to July 1999, employees were reduced in force at the Alice, Texas district. (Tr. 1049). He testified that after Complainant's reduction in force, Mr. Rose came in, assessed the situation, identified the problems and moved toward a resolution of the problems. (Tr.

1053).

On cross-examination, Mr. Greer acknowledged that he attended a meeting with Wayne Fulin in April 1999. (Tr. 1054). He stated that in April 1999 Respondent was not in compliance with DOT in electronic logs, but he did not recall discussing logs with Mr. Fulin. (Tr. 1055, 1057). He stated that the Alice district was still using paper logs and practicing on electronic logs at that time. (Tr. 1064). The monitors were not working properly in April 1999. (Tr. 1065). He recalled Complainant discussed wiring problems, but could not recall if it was at the meeting with Mr. Fulin. (Tr. 1058, 1064). He could not recall any discussion about CMVs with inoperable speedometers at the meeting. (Tr. 1058-1059). He affirmed that it was not Respondent's policy to "cover" for drivers who did not keep their logs properly. (Tr. 1067).

Mr. Greer testified that Complainant did not turn in her lap top computer on the day of her reduction in force. (Tr. 1373). She kept the computer for four to five days because she wanted to take some "personal things" off the computer. (Tr. 1374). He was also aware that Complainant could not turn-in her lap top computer because it was being fixed at IBM. Id.

Roger Theis

Mr. Theis is presently a staff support engineer for Respondent in Midland, Texas. (Tr. 1300). He worked for Respondent for 19 years as a QHSE manager in South Texas/Southeast until he was reduced in force in March 1999. (Tr. 1300-1301). He supervised Complainant from October 1998 until March 1999. He testified that the Alice facility manager came to him and suggested that the "budget was tightening up," and he could not afford to employ Complainant any longer. He further suggested that Mr. Theis "pick her up, or otherwise, he would have to let her go." (Tr. 1301). Since the Rockwell system was part of his job duties, and he feared with the reduction in force already started in other parts of the U. S., the system would not have any supervision if he did not retain Complainant. He agreed to accept her at the regional level in October 1998. (Tr. 1302).

He testified that all units had monitors installed by the end of 1998. Id. The next phase was to train the drivers and calibrate the units in the following year. (Tr. 1302-1303). The system was not "live" when he left in March 1999. (Tr. 1303). He stated he never had a discussion with Complainant about her being forced to falsify logs. He did not ask her to falsify logs and knew of no member of management who did. Complainant talked to him about getting her CDL, but he saw no need for her to have a CDL in

her position since she would not to be driving vehicles. (Tr. 1303-1304). She never submitted any RIRs to him, nor did she raise any concerns about unsafe conditions with the installation of the Rockwell monitors. It would have been her responsibility to report any safety problems to him as her supervisor. (Tr. 1305).

He attended the July 23, 1999, meeting in Corpus Christi, Texas with Neil Campbell, Guy Lombardo, Alan Melton and Complainant, but she did not raise any issues about safety violations. (Tr. 1308). The discussion centered on the status of the monitor installations. Complainant did not raise any issues regarding violations of DOT regulations, safety violations or falsification of logs. He stated that no unit fires were reported relating to the Rockwell system or faulty wiring. (Tr. 1309).

Linda Clark

Ms. Clark is presently the work environment manager for Respondent's Product Center in Sugarland, Texas, but previously worked in different personnel management positions. She has worked for Respondent for 20 years. (Tr. 1316-1317). She testified that she had not seen the June 26, 1999 letter addressed to her from Complainant until preparing for the instant hearing. (Tr. 1318). She did not receive the letter, sent to the wrong address, in the ordinary course of business, but stated if she had it would have made a strong impression on her and she would not have forgotten it. She stated that the matters set forth in the letter were not her responsibility, but she would have passed the letter on to the appropriate department if she had received the letter. (Tr. 1320).

She is familiar with Respondent's reduction in force policy which is usually a result of a decline in business activity. At some point, work performance becomes an issue in the reduction in force. (Tr. 1321). She stated that typically the employee skill base is evaluated as well as performance and "if everything is the same," longer-service employees are usually retained. (Tr. 1322). During the first three quarters of 1999, the decline in business activity affected the Product Center as well as the field. Voluntary early-retirement packages were offered to employees. (Tr. 1323).

On cross-examination, she testified that in April-May 1999, many employees called the Product Center for job opportunities because business was declining and they were afraid of losing their jobs. She could not recall speaking with Complainant or if she called in search of a transfer. (Tr. 1326). If Complainant would have informed her that she was being forced to violate DOT/OSHA

rules and regulations, that would have "perked [her] senses up because [she] would have been very concerned about that." She would have directed the caller to go through proper channels. She would not have requested a letter because she knew nothing about DOT/OSHA, which is "out of [her] domain." (Tr. 1328).

Liese Borden

Ms. Borden has been employed with Respondent for 15 years principally as a personnel manager but is currently working as diversity and dual-career manager. She was personnel manager for the West Texas Region when it assumed the South Texas area and became Central U. S. Land. (Tr. 1331). She testified that before the reorganization, a reduction in force had been in progress since 1998 and West Texas had been reduced from 600 employees down to 200 employees. Before the merger of the two regions, extra support remained, such as two personnel managers, two general managers, two safety managers and two Rockwell system administrators. (Tr. 1332-1333). Her counterpart in Corpus Christi was reduced in force through job elimination. Some employees were transferred, but many were laid off. (Tr. 1333).

She was familiar with the July 9, 1999 letter addressed to Mr. Baird from Complainant. (Tr. 1334). She contacted Complainant to set up a meeting for August 17, 1999, in Alice, Texas. The meeting lasted about two and one-half hours. (Tr. 1335). She met with Complainant for a period of time before Mr. Campbell joined the meeting. The three areas Ms. Borden wanted to cover with Complainant were the redundancy of her job in the reduction in force decision, her severance pay and her allegations. (Tr. 1336). She testified that Complainant never raised an issue of tuition reimbursement but did raise disputed expenses. (Tr. 1338).

Complainant informed Ms. Borden that when hired she was told her job was guaranteed for a certain period of time. Complainant did not produce anything in writing to support her claim and Ms. Borden had never seen any job guaranteed, "especially in the oil business, because it's just such a volatile business." (Tr. 1342). The guarantee of a job for a period of time was out of characterization with the way Respondent operates. (Tr. 1343). When the meeting turned to the DOT allegations, Mr. Campbell joined the meeting. Complainant complained that Respondent was not following DOT policy because the electronic logs were being falsified. No specifics were mentioned. (Tr. 1350). She reported that she had e-mailed Mr. Campbell in an effort to set up a meeting to discuss the issue, but he was too busy to meet. She also reported raising the falsification issue at a roundtable meeting with Guy Lombardo, Roger Theis, Alan Melton and Neil Campbell.

(Tr. 1344). Ms. Borden testified that Mr. Campbell did not recall the allegation being raised at the roundtable meeting, nor did the other attendees contacted after the August 17, 1999 meeting. (Tr. 1345). It was also Ms. Borden's appreciation after the meeting that Complainant was claiming the Rockwell system was illegal because it was not being set up/installed correctly to properly track logs.

Complainant did not inform Ms. Borden that she had visited or complained to the Texas Department of Public Safety or DOT about her concerns. (Tr. 1348). Complainant did not present any logs or RIRs and did not mention that Mr. Lombardo had yelled at her or created a hostile environment. (Tr. 1351). She did not relate that anyone demanded she drive a CMV without a CDL or inoperable speedometer. (Tr. 1351-1352). After the meeting, Ms. Borden investigated Complainant's issues, but found no corroboration for the allegations. She never told Complainant that she had legitimate concerns because her objective was to gather information and "go back to look into" the allegations. (Tr. 1355).

Ms. Borden had never seen the June 26, 1999 letter addressed to Ms. Clark from Complainant. (Tr. 1353). She testified that she met with the OSHA investigator but was never asked any questions about broken speedometers, CDLs, CMVs or Mr. Lombardo yelling at or being hostile to Complainant. (Tr. 1353).

Complainant asked Ms. Borden why Mr. Rose was retained and she was not. Mr. Campbell responded that the reduction in force was forcing Respondent to go to one Rockwell administrator and based on performance, Mr. Rose's performance had been superior to Complainant's. Mr. Campbell did not state that Mr. Rose was retained over Complainant because she went to DOT and Mr. Rose did not. (Tr. 1356). Ms. Borden further testified the issue was redundancy because of business downturn, not performance and that a ranking determination was made which also included seniority as well as skills and experience. (Tr. 1357). It was determined that Mr. Rose was more appropriate to retain that Complainant. (Tr. 1358).

IV. DISCUSSION

A. Credibility

Prefatory to a full discussion of the issues presented for resolution, it must be noted that I have thoughtfully considered and evaluated the rationality and consistency of the testimony of all witnesses and the manner in which the testimony supports or detracts from the other record evidence. In doing so, I have taken

into account all relevant, probative and available evidence and attempted to analyze and assess its cumulative impact on the record contentions. See Frady v. Tennessee Valley Authority, Case No. 92-ERA-19 @ 4 (Sec'y Oct. 23, 1995).

Credibility of witnesses is "that quality in a witness which renders his evidence worthy of belief." Indiana Metal Products v. NLRB, 442 F.2d 46, 51 (7th Cir. 1971). As the Court further observed:

> Evidence, to be worthy of credit, must not only proceed from a credible source, but must, in addition, be credible in itself, by which is meant that it shall be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe... Credible testimony is that which meets the test of plausibility.

442 F.2d at 52.

It is well-settled that an administrative law judge is not bound to believe or disbelieve the entirety of a witness' testimony, but may choose to believe only certain portions of the testimony. Altemose Construction Company v. NLRB, 514 F.2d 8, 16 and n. 5 (3d Cir. 1975).

Moreover, based on the unique advantage of having heard the testimony firsthand, I have observed the behavior, bearing, manner and appearance of witnesses from which impressions were garnered of the demeanor of those testifying which also forms part of the record evidence. In short, to the extent credibility determinations must be weighed for the resolution of issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and the demeanor of witnesses.

Complainant's burden of persuasion rests principally upon her testimony. The indicia of her **prima facie** case is rarely corroborated by the testimony of other witnesses or documentary exhibits. Her testimony can best be characterized as equivocal, contradictory and proned to embellishment. For the most part, her alleged activity was "internal," i.e., alleged complaints to Respondent's management.

The only activity involving an entity outside of Respondent's corporate structure is embodied in her visit to the Texas Department of Public Safety with Ralph Bocanegra. Initially, her testimony established the visit's purpose was to gather information about the "legality" of the electronic logs, to which Mr. Bocanegra agreed. Thereafter, Complainant began embellishing the purpose of the visit. She attempted to establish that the logs were falsified and the Department inquired if she desired to file a "complaint," thus arguably a "verbal" complaint was lodged about the falsification of electronic logs in an obvious effort to bring her case within the statutory language of the STAA. Yet inconsistently, she testified that she did not file a complaint and in fact declined to do so. Moreover, she testified that falsification of logs was not considered an unsafe condition. (Tr. 643). Mr. Bocanegra's testimony is not corroborative since it is devoid of any Department findings of falsification or the solicitation of a complaint.

The alleged internal complaints were also uncorroborated and consistently denied by other witnesses. Thus, Complainant attempted to improve her case by attributing demands from her first two location managers that she drive a CMV despite the lack of a CDL, notwithstanding sworn deposition testimony that only Mr. Lombardo and Ronnie Walling allegedly required that she drive. Furthermore, although she had ample opportunity to "air" her alleged refusal to drive, complaints of log falsification and unsafe vehicular conditions in various documents to include her June 26, 1999 letter to Ms. Clark, her July 9, 1999 letter to Mr. Baird, her August 17, 1999 letter to Ms. Borden and her "diary" agenda, she failed to do so, which is highly suspicious and inconsistent with her testimony. The most telling alleged admission from Respondent or act of embellishment, that she was selected for reduction in force and Mr. Rose was not because she went to DOT, was never alleged in any documentary exhibit or subsequently filed complaint.

Consequently, I found Complainant generally an unimpressive witness. Although I do not totally discredit her testimony, her efforts to embellish and the inconsistencies evident throughout her case have diminished its probative value.

B. The Statutory Protection

The employee protection provisions of the STAA provide, in pertinent part:

(a) Prohibitions. (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay,

terms, or privileges of employment, because –-

(A) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or

(B) the employee refuses to operate a vehicle because –

(i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or

(ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

49 U.S.C.A. § 31105(a). Thus, under the employee protection provisions of the STAA, it is unlawful for an employer to impose an adverse action on an employee because the employee has complained or raised concerns about possible violations of these DOT regulations. 49 U.S.C.A. § 31105(a)(1)(A). See, e.g., Reemsnyder v. Mayflower Transit, Inc., Case No. 93-STA-4, @ 6-7 (Dec. and Ord. On Recon. May 19, 1994). Furthermore, it is unlawful for an employer to impose an adverse action on an employee who has refused to drive because operating a vehicle violates DOT regulations or because she has a reasonable apprehension of serious injury to herself or the public. 49 U.S.C.A. § 31105(a)(1)(B).

The purpose of the STAA is to promote safety on the highways. As noted by the Senate Commerce Committee which reported out the legislation, "enforcement of commercial motor vehicle safety laws and regulations is possible only through an effort on the part of employers, employees, State safety agencies and the Department of Transportation." 128 Cong. Rec. S14028 (Daily ed. December 7, 1982). The Secretary has recognized that "an employee's **safety** complaint to his employer is the initial step in achieving this goal . . . an internal complaint by an employee enables the employer to comply with the safety standards by taking corrective action immediately and limits the necessity of enforcement through formal proceedings." (Emphasis added). Davis v. H. R. Hill, Inc., Case No. 86-STA-18 @ 2 (Sec'y Mar. 19, 1987).

C. The Burden of Proof

To prevail on a whistleblower complaint, a complainant must establish that the respondent took adverse employment action because she engaged in protected activity. A complainant initially

may show that a protected activity likely motivated the adverse action. Shannon v. Consolidated Freightways, Case No. 96-STA-15, @ 5-6 (ARB Apr. 15, 1998). A complainant meets this burden by proving (1) that she engaged in protected activity, (2) that the respondent was aware of the activity, (3) that she suffered adverse employment action, and (4) the existence of a "causal link" or "nexus," e.g., that the adverse action followed the protected activity so closely in time as to justify an inference of retaliatory motive. Clean Harbors Environmental Services, Inc. v. Herman, 146 F.3d 12, 21 (1st Cir. 1998); Kahn v. United States Sec'y of Labor, 64 F.3d 261, 277 (7th Cir. 1995). A respondent may rebut this **prima facie** showing by producing evidence that the adverse action was motivated by a legitimate nondiscriminatory reason. The complainant must then prove that the proffered reason was not the true reason for the adverse action and that the protected activity was the reason for the action. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506-508 (1993).[6]

However, since this case was fully tried on its merits, it is not necessary for the undersigned to determine whether Complainant presented a **prima facie** case and whether the Respondent rebutted that showing. See Roadway Express, Inc. v. Dole, 929 F.2d 1060, 1063 (5th Cir. 1991); Ciotti v. Sysco Foods Co. of Philadelphia, Case No. 97-STA-30 @ 4 (ARB July 8, 1998). Once Respondent has produced evidence that Complainant was subjected to adverse action for a legitimate, nondiscriminatory reason,[7] it no longer serves

---

[6] Although the "pretext" analysis permits a shifting of the burden of production, the ultimate burden of persuasion remains with the complainant throughout the proceeding. Once a respondent produces evidence sufficient to rebut the "presumed" retaliation raised by a prima facie case, the inference "simply drops out of the picture," and "the trier of fact proceeds to decide the ultimate question." St. Mary's Honor Center, 509 U.S. at 510-511. See Carroll v. United States Dep't of Labor, 78 F.3d 352, 356 (8th Cir. 1996)(whether the complainant previously established a prima facie case becomes irrelevant once the respondent has produced evidence of a legitimate nondiscriminatory reason for the adverse action.)

[7] The respondent must clearly set forth, through the introduction of admissible evidence, the reasons for the adverse employment action. The explanation provided must be legally sufficient to justify a judgment for the respondent. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253, 256-257. Respondent does not carry the burden of persuading the court that it had convincing, objective reasons for the adverse

any analytical purpose to answer the question whether Complainant presented a **prima facie** case. Instead, the relevant inquiry is whether the Complainant prevailed by a preponderance of the evidence on the ultimate question of liability. If she did not, it matters not at all whether she presented a **prima facie** case. If she did, whether she presented a **prima facie** case is not relevant. Adjiri v. Emory University, Case No. 97-ERA-36 @ 6 (ARB July 14, 1998).

The undersigned finds that as a matter of fact and law, Respondent has articulated a legitimate, nondiscriminatory reason for its adverse action as explicated hereinafter.

However, since Complainant proceeded without the assistance of counsel, the elements of her case, my analysis of her presentation and my rationale for reaching the conclusions deemed warranted in this matter will, at least summarily, be discussed.

1. The Statutory Allegations

A. Filing of a Complaint/Testimony

Although Complainant alleged that she was terminated because she filed a complaint or began a proceeding related to a violation of a commercial motor vehicle safety regulation, the record is completely bereft of any credible evidence in support of such a claim. Furthermore, the record does not support a conclusion that Complainant testified or "will testify" in such a proceeding at the time of her elimination from employment with Respondent.

The record is clear that the only activity in which Complainant engaged which arguably satisfies the statutory protection language is her contact with the Texas Department of Public Safety, a state safety agency. See Adams v. Coastal Production Operators, Inc., Case No. 89-ERA-3 @ 13 (Sec'y Aug. 5, 1992)(discharge for reporting an oil spill to the Coast Guard); Dutkiewicz v. Clean Harbors Environmental Services, Inc., Case No. 95-STA-34 @6 (ARB Aug. 8, 1997)(contact with the state environmental protection agency). As noted above, Complainant's testimony vacillated from one purpose/reason for the meeting to another. She admits that the electronic logs and their alleged "falsification" were the only subjects raised with the Department, which she concedes does not involve a safety concern. A literal reading of her testimony cannot support a finding that she filed a "complaint" or began a proceeding. Moreover, she acknowledged that

---

employment action. Id.

such a complaint proceeding could not be initiated until she actually filed a written complaint, which she did not do.

Assuming **arguendo** that a verbal complaint was made to the Texas Department of Public Safety involving a safety concern, there is no credible evidence that Respondent had any knowledge of her activity at the time she was selected for elimination or later when she was actually terminated. She vaguely claims, without specifics or explication, that she informed Mr. Fulin of her visit to the Texas Department of Public Safety. He denied any knowledge of such a visit or that she so informed him. There is no other corroborative evidence through e-mail, RIRs or exhibits that supports her contention. She also claimed that on June 21, 1999, she told Mr. Lombardo that she had been to "DOT" and would go to DOT/OSHA. He credibly denied that Complainant informed him that she had gone to DOT or would go to DOT/OSHA. She did not mention her visit to the Texas Department of Public Safety. More telling of her inconsistencies is the representations made in her June 26, 1999 letter to Ms. Clark, written a few days later which is silent regarding her meeting with Mr. Lombardo on June 21, 1999, wherein she refers prospectively to a June 28, 1999 meeting with Mr. Lombardo and that she is "also going to tell him that I **will be going** to DOT/OSHA...." I do not credit Complainant's testimony that she informed Mr. Lombardo she had gone to "DOT" or would go to DOT/OSHA since it is incredulous under the circumstances.

The record is equally devoid of any evidence that Complainant testified or would have testified in a complaint proceeding. The fact that she testified during the investigation of her complaint filed in October 1999, <u>after</u> her termination is not sufficient to meet the statutory protection language.

Accordingly, I find and conclude that Complainant has failed to establish that she filed a complaint or testified in a proceeding as required by 49 U.S.C.A. § 31105(a)(1)(A) of the STAA.

B. Refusal to Drive

A refusal to drive is protected under two STAA provisions. The first provision, 49 U.S.C.A. § 31105(a)(1)(B)(i) requires that complainant "show that the operation [of a motor vehicle] would have been a genuine violation of a federal safety regulation at the time she refused to drive." <u>Yellow Freight Systems v. Martin</u>, 983 F.2d 1195, 1199 (2d Cir. 1993). The second refusal to drive provision focuses on whether a reasonable person in the same situation would conclude that there was a reasonable apprehension of serious injury if she drove. 49 U.S.C.A. § 31105(a)(1)(B)(ii). <u>Cortes v. Lucky Stores, Inc.</u>, Case No. 96-STA-30 @ 4 (ARB Feb. 27,

1998).

The STAA defines reasonable apprehension as:

> An employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury or serious impairment to health. To qualify for protection, **the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.** (Emphasis added).

49 U.S.C.A. § 31105(a)(2).

Aside from the burden established by the foregoing statutory requirements, Complainant's allegations regarding her refusal to drive a CMV are fraught with recantations and contradictions. The allegations raised for the first time at hearing, that she was "asked" to drive a CMV by her first two managers in 1998, assuming such a request was made and was violative of the Act, would have been time-barred when she filed her complaint with OSHA in October 1999. Incredibly, she provided prior sworn testimony contradicting the new allegations. Nevertheless, Complainant has not shown that the vehicle which she was asked to drive was unsafe or that its operation would have been in violation of a federal safety regulation. Presumably, if she had been forced to drive a CMV without a proper license (CDL), a violation of a federal motor regulation would have occurred. However, no adverse action was meted out to her for refusing or failing to drive as requested.

Complainant claims that Mr. Lombardo and Ronnie Walling demanded that she drive a CMV. The record is too vague to reach a finding that Mr. Walling even demanded that Complainant drive a CMV, when such a demand may have occurred and under what circumstances. Accordingly, I accord no weight to Complainant's allegation that such a demand was made. No adverse action was apparently forthcoming for her alleged refusal.

Mr. Lombardo denied that he demanded she drive a CMV or would lose her job if she refused. He was not in favor of Complainant even being licensed as a driver since her job did not require her to drive to perform her job functions. He credibly confirmed that

he would not allow her to drive without a CDL. Complainant's accusation that Mr. Lombardo yelled at her and demanded she drive CMVs without a CDL stretches credulity too far to assign any probative weight to such an allegation. Mr. Lombardo is undoubtedly an intense individual but, given his position with Respondent as QHSE, his alleged demand would have been the antithesis of his work ethic and goals for Respondent. I credit Mr. Lombardo's testimony and denials in this regard.

To the extent Complainant claims to have refused to drive a vehicle with an inoperable speedometer, the credible record evidence establishes that few speedometers were ever inoperable and, if so, were identified for repair. The record also establishes that the on-board computer provided speed measurements as well, if a speedometer was malfunctioning. The record is silent with regard to any vehicle that may have suffered a non-working speedometer and on-board computer simultaneously. Complainant failed to show that if required to drive such a vehicle that she sought correction of the malfunction and was unable to correct the unsafe condition.

In view of the foregoing, the record is deficient in its support for Complainant's refusal to drive a CMV at the request or demand of management officials. She did not claim the refusal to drive as a basis of her complaint to OSHA, nor was it a finding entered by the Secretary. As noted by the Respondent, in the exhibits received into evidence which represent her written communications with OSHA, no mention is made of her refusal to drive a CMV at the demand or request of Respondent until November 22, 1999 in prepared questions submitted to the OSHA investigator.

Accordingly, for the above reasons, I find and conclude that Complainant has failed to sustain her burden that she refused to drive an unsafe CMV or refused to drive because she was not properly licensed. Moreover, she has failed to fulfill the evidentiary requirements embodied in 49 U.S.C.A. § 31105(a)(1)(B)(ii) to show an effort at correction of the unsafe condition.

2. Complainant's Internal Complaints

Complainant's principal duties during her employment as a system administrator were supervision of installation and repair of on-board computer monitors and troubleshooting the system. Respondent was implementing the on-board computer system to monitor driver performance from a safety perspective and transitioning from a paper log to an electronic log system. Her job involved reporting any alleged unsafe conditions or DOT violations. (Tr. 1256).

According to Mr. Lombardo, the catalog of "complaints" raised by Complainant were matters that Respondent would expect her to report. (Tr. 1289). Moreover, it was every employee's responsibility to report any unsafe condition "so we can fix them," according to Mr. Schneider, who encouraged employees to report unsafe acts and to stop an operation if they deemed it unsafe. Respondent's Risk Identification Report (RIR) was a mechanism by which employees could and did raise safety and other issues to management. The Loss Prevention Team, of which Complainant was a member, reviewed RIRs for corrective action and granted awards for the best RIRs. No employee was ever terminated for reporting a safety condition. It is within this safety-oriented environment that Complainant's "complaints" must be evaluated as protected activity.

In performing her job duties, Complainant reported a myriad of concerns to her supervisors, location/facility managers, mechanics and safety personnel. Her testimony centered on problems with CMVs, such as inoperable speedometers[8] and alleged falsification of electronic and paper logs.[9] Her safety concerns included improper (uninsulated) wiring of electrical circuits which caused unit fires;[10] electrical shorts causing cellular phones and batteries to die out; distractive keypad mountings; wire harnesses; and unsafe emergency exits, fire protection and hearing protection. According to Complainant, all of the foregoing concerns were made the subject of RIRs and/or e-mails, none of which were offered into evidence in this record.

---

[8] Complainant's claim that in September-October 1998 as many as 40 units did not have operable speedometers in the Alice district was effectively refuted by certified mechanic Zachary Tamez of the Alice district who testified that an inoperable speedometer was a rare event and he only had to repair five speedometers in three years.

[9] Mr. Melton, Lombardo and Rose testified that Complainant had a misconception that editing an electronic log, which is permitted by DOT and is a legal act, was "falsification" of the log. In South Texas, Respondent was not "live" with the computer system in June 1999. Complainant's claim that she was directed by Mr. Lombardo to make the logs match is illogical since a combination of electronic and paper logs was authorized by DOT.

[10] Mr. Melton, Greer and Theis denied the occurrence of any unit fires caused by the wiring of the on-board computer system.

Complainant also complained to unspecified individuals about "management factors," such as lack of new employee training; an inadequate safety environment; "improper assignment of responsibilities;" unsuitable equipment, such as the computer system and wiring harness; insufficient funding to carry out travel to perform troubleshooting; and "ignorance of the hazard of materials or processes, situational factors and environmental factors." RIRs and/or e-mails were generated on the foregoing subjects as well according to Complainant.

In her May 19, 1999, report to "Wayne," she related additional concerns to include MSDS sheets being typed incorrectly; expired medical cards; drivers over-logged with falsified logs and inadequate paperwork; accidents caused by cellular phone use; improper use of safety harnesses; poor housekeeping; non-use of safety glasses; and mechanic's hoists in maintenance shops not being inspected. Complainant recommended corrective actions for such safety concerns.

As previously noted, Complainant failed to offer into evidence any RIRs or e-mails corroborating the foregoing concerns. I find that the May 19, 1999, letter was not received by Mr. Fulin or any of the individuals copied in the correspondence. None of the witnesses to whom Complainant presented RIRs could recall seeing any related to unsafe conditions, "falsification" of logs or inoperable speedometers.

Respondent, relying on Macktal v. U.S. Department of Labor, 171 F.3d 323 (5th Cir. 1999), argues that none of the reports offered by Complainant as evidence constitute communications that are sufficient to give notice that a complaint is being filed and thus she was engaged in an activity that is protected.[11] Moreover, Respondent asserts that the "substance of Complainant's communications are only generalized issues, none of which could be construed as whistleblowing." Respondent contends that it must be

---

[11] The Fifth Circuit's ruling in Macktal [an ERA case] is controlled by its earlier decision in Brown & Root, Inc. v. Donovan, 747 F.2d 1029 (5th Cir. 1984)[also an ERA case] where it was concluded that internal complaints do not rise to the level of protected activity under the ERA. However, in Stiles v. J. B. Hunt Transportation, Inc., Case No. 92-STA-34 @ 2 (Sec'y Sept. 24, 1993), the Secretary declined to follow the Fifth Circuit's rulings by extending the Brown & Root rationale to cases under the STAA for reasons previously noted regarding the legislative intent of the Act. Although this matter arises within the jurisdiction of the Fifth Circuit Court of Appeals, I am constrained to follow the Secretary's position.

given adequate notice that a complaint is being filed before the activity can be construed as protected. See Clean Harbors Environmental Services, Inc. v. Herman, supra. Unlike Clean Harbors, Complainant did not produce any communications outside of her normal supervisorial chain or that specifically notice a particular violation. However, a failure to point out any particular commercial motor vehicle safety standard that was violated does not deprive Complainant of coverage under the STAA. See Davis, supra, @ 3; Nix v. Nehi-R.C. Bottling Co., Case No. 84-STA-1 @ 8-9 (Sec'y July 13, 1984).

I agree with Respondent that Complainant engaged in a "shotgun approach" of uncorroborated allegations, which for the most part, were either refuted, rebutted or corrected by Respondent. Furthermore, she raised safety concerns which were expected in the normal course of her job duties "troubleshooting" the on-board computer system. It is noteworthy that in her efforts to set up a meeting with Mr. Campbell, she conveys that she has "concerns not complaints."

Respondent further argues that the tenor or tone of her correspondence contradicts her position at hearing which should not be construed as notice that she was engaging in protected activity. Thus, notwithstanding the safety concerns expressed, on June 28, 1999, days before her reduction in force, Complainant e-mailed Mr. Lombardo stating "I am very proud training and working with a team that want (sic) to make Rockwell a success and a (sic) attitude of doing it safe." Respondent avers that Complainant's communications were not intended to be nor were they perceived by Respondent to be complaints. Respondent posits that Complainant's communications were viewed as part of her job, not as notice of alleged violations of regulations. As such, it is urged that Complainant's concerns were purely internal and not protected under the STAA.

The Administrative Review Board has held that internal complaints to management officials are protected activity under the STAA. See Dutkeiwicz v. Clean Harbors Environmental Services, Inc., supra @ 3-4; Asst. Secretary and Killcrease v. S & S Sand and Gravel, Inc., Case No. 92-STA-30 @ 8 (Sec'y Feb. 5, 1993). I find that Complainant made internal complaints to Respondent which arguably constitute protected activity. There is no dispute that she suffered an adverse employment action when she was eliminated from Respondent's employment. There is little doubt that Respondent had knowledge of Complainant's findings and concerns through her troubleshooting efforts which is reflected in the testimony of Respondent's witnesses Lombardo (Tr. 234, 255, 269, 278, 279, 318-319), Fulin (Tr. 512) and Campbell (Tr. 575, 580; XC-6-48, Bates No. 447). The crucial questions are whether Respondent construed her

complaints as protected activity or as the accomplishment of her normal course of duties and whether her elimination was causally related to her complaints.

I find that Respondent acted in a non-discriminatory manner when Complainant was reduced in force for a legitimate business reason. I further find that Complainant's selection for reduction in force was not motivated by her "complaints" or activity. Complainant was never given a reprimand, a write-up or counseling for complaints made to management because her identification of problem areas was considered a fulfillment of her job functions.

3. Respondent's Legitimate Non-discriminatory Business Reason for Its Action

A. The Business Downturn

Respondent provides a wide range of oil field services to customers engaged in the search and production of oil and gas. Respondent's business is gauged by the activities of its customers and the fluctuating price of crude oil and gas. (Tr. 482). The price of a barrel of crude oil declined from the mid-$20 range in early 1998 to $10 per barrel at the end of 1998. The drop-off was considered "quick, extreme and unexpected." Industry specialists projected a two-year downturn.

Respondent began cost-cutting materials, travel and employee compensation, its highest cost over which it had the most control. A reduction in force started in September 1998 because of the business downturn and continued through 1999. Complainant acknowledged awareness of the business downturn and personnel reductions. (Tr. 853-854). By December 1998, Respondent was down to 931 employees from a high of 1244 in January 1998, and an operating loss of $511,000. (RX-47). By the first quarter of 1999, Respondent's net revenues had diminished from $10,671,000 in the first quarter of 1998 to a loss of $1,454,000. Id. Gross revenues had dropped from over $30 million in January 1998 to less than $15 million by May 1999. (RX-49). By the end of the second quarter 1999, Respondent was down to 643 employees and had sustained a $539,000 loss, which was partially offset by ongoing cuts in costs.

In early April 1999, in an effort to "gain efficiencies and reduce costs," Respondent began evaluating a reorganization of its U. S. Land operations. In May 1999, a decision to reorganize from five regions down to three regions was made by a group of upper level managers. (Tr. 1123). Regional managers, such as Don Gawick, were responsible for implementing the decision and downsizing the business.

The head count in U. S. Land was reduced by 30% as a result of the reduction in force. South Texas, headquartered in Corpus Christi, Texas, was combined with West Texas to become Central Region. The Corpus Christi regional office was eliminated and downgraded to a sales office. Ms. Borden, who was the personnel manager for West Texas was retained in Central Region, however her counter-part in South Texas was reduced in force through job elimination. Duplicate job positions also existed with two general managers, two safety managers and two Rockwell system administrators. According to Ms. Borden, before the reorganization, the West Texas region had been reduced in force from 600 to 200 employees. The Alice, Texas district in South Texas had suffered a head count reduction beginning in 1998 to the third quarter 1999 from 250 to 130 employees. (Tr. 491). According to Mr. Schneider, the Alice operation lost money from the end of 1998 until December 1999. (Tr. 482).

Although an increase in revenues and head count began in June 1999, such data was not available until mid-July 1999. The increase in head count in the third quarter 1999 represents newly hired field personnel, driver/operators, not support personnel according to Mr. Fulin. The Respondent's operation remains volatile which requires constant "tweaking." Reductions in force occurred as late as April 2000 in GeoQuest and an operation in Michigan was closed down because of a lack of a long-term future. Complainant's functions would not have been a necessary part of Respondent's operation in the third and fourth quarters 1999 according to Mr. Fulin.

Based on the foregoing, I find and conclude, as a matter of fact and law, that Respondent had a legitimate business reason for reorganizing its operation and downsizing its work force through reductions in force. The selection of Complainant for reduction in force must now be analyzed.

B. The Selection of Complainant for Reduction in Force

The Rockwell area system administrator positions in U. S. Land were reduced from three to two through reorganization. On July 6, 1999, the position of Complainant, who had one year and three months service with Respondent, was eliminated. I find her position was eliminated as part of the ongoing reduction in force and the reorganization.

Paul Rose, the area system administrator for West Texas and Mid-Continent Regions with six years seniority, was retained in Central Region. Don Sikorski, the area system administrator for Northeast Region, was retained in the Eastern Region which merged

with the Southeast Region. Neither Central nor Eastern Regions needed two system administrators. On May 19, 1999, Mr. Rose was selected by Mr. Lombardo, with whom he had worked before the reorganization, as the area system administrator for Central Region. Mr. Lombardo concluded that Central Region had no need for anyone to perform the job Complainant was performing in 1999 (supervising monitor installations and repairs and troubleshooting) as a "fix-it person," an approach with which he did not agree. Mr. Rose, on the other hand, interfaced with managers, accessing computers, evaluating data, printing out information, gauging and ranking data for feedback to the districts as a measure of their performance. The record supports a finding that Mr. Lombardo viewed Mr. Rose as more responsive to his need for data and information and his job performance as more beneficial to the Region than that of Complainant.

Complainant's position was considered a "duplicate" to Mr. Rose or a redundancy to mechanic and electronic technicians who were assuming installation and troubleshooting functions. Since Respondent had no other position in Central Region for Complainant, Mr. Fulin searched, without success, for job opportunities for her in the Eastern Region to which she could transfer. Mr. Fulin, who believed Complainant was a good performer, would have recommended her for other job opportunities. These efforts by Respondent belie any hostility toward Complainant for her alleged activities.[12]

I find that Respondent had no knowledge of Complainant's visit to the Texas Department of Public Safety when it decided to eliminate her position on May 19, 1999. I further find that the nature of Respondent's business as an interstate carrier and its interests in achieving a greater safety perspective with its computer monitoring system mitigates against a causal link or nexus between Complainant's alleged activity and her selection for reduction in force. Therefore, for the foregoing reasons, I conclude that Complainant's selection for reduction in force was non-discriminatory, motivated by legitimate business reasons not her alleged protected activity.

The burden shifts back to Complainant to prove that the reasons

---

[12] The only evidence of "hostility" offered by Complainant was Mr. Lombardo anger at her for refusing on June 18, 1999, to send by e-mail the passwords or "access codes" for facility computers to allow him access to data needed for a report. At this point in time, she still had not provided the information in the format requested by Mr Lombardo on May 24, 1999. The June 21, 1999, meeting was scheduled to gather the information still outstanding.

Respondent proffered for her elimination were pretextual and not credible and that the true reason was retaliation for her safety complaints. I find that Complainant did not meet her burden. No evidence was offered to show that Respondent's actions were unfounded and not legitimate. Thus, I find and conclude Complainant failed to establish, by a preponderance of the record evidence, that she was subjected to adverse action by Respondent because of her alleged protected activity. The weight of the evidence supports the conclusion that Complainant was selected for reduction in force because her position was a duplicate to Mr. Rose who was chosen as Central Region administrator and her functions were redundant to facility mechanics and electronic technicians who began assuming her duties and tasks.

V. CONCLUSION

For the reasons discussed above, I find and conclude that Complainant failed to present convincing evidence to establish she was subjected to adverse employment action by Respondent because of her alleged protected activity or that Respondent proffered reasons for elimination of her position and reducing her in force which were a pretext for discriminatory retaliation. Based on the foregoing analysis, I further find and conclude that Respondent eliminated Complainant's position and reduced her in force for legitimate business reasons and not because of her alleged protected activity.

VI. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, Respondent has not unlawfully discriminated against Nancy Young because of her alleged protected activity and her Complaint is hereby **DISMISSED.**

ORDERED this 10TH day of August, 2000, at Metairie, Louisiana.

_____

LEE J. ROMERO, JR.
Administrative Law Judge

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, United States Department of Labor, Room S-4390, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D. C. 20210. See 29 C. F. R. § 1978.109(a); 61 Fed Reg. 19978 (1996).